THE

MONTHLY LAW REPORTER.

DECEMBER, 1853.

HILLHOUSE'S PROPOSED AMENDMENTS TO THE CONSTITUTION.[1]

To obviate evils endured and apprehended under the practical working of some of the provisions of our Constitution from the excessive power of the Executive, several amendments of that instrument have been proposed, all having reference to the presidential office. These are —

That the President shall be elected to serve six years, or ten years, and that no person shall be elected a second time.

That the President shall be chosen by a direct vote of the people.

That many subordinate national officers, now appointed by the President and Senate, shall be chosen by the people of the districts or cities within which their duties are performed.

It is not our purpose to consider these amendments, nor either of them. But we desire to call attention to a series, proposed by the Honorable James Hillhouse, of Connecticut, to the Senate of the United States, in 1808.

Mr. Hillhouse was born in 1754, was graduated at Yale College in 1773, and commenced, after due preparation,

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[1] Propositions for amending the Constitution of the United States, submitted by Mr. Hillhouse to the Senate, April 12th, 1808, with his Explanatory Remarks. New Haven: Oliver Steele & Co. 1808. pp. 31.

Review of the above Propositions and Explanatory Remarks, by John Adams. pp. 23. Life and Works of John Adams. Edited by his Grandson, Charles Francis Adams. In 10 Volumes. Vol. II. Boston: Little & Brown. 1851.

the practice of the law. He took an active part in the revolutionary struggle, and when New Haven was invaded by the British, in 1779, was captain of the Governor's Guards. In 1791, he was chosen a representative to Congress, and after serving three years in that capacity, was chosen a member of the Senate, of which body he continued a distinguished member for the unusual period of sixteen years. In 1810, he resigned his seat to undertake the duties of Commissioner of the Connecticut School Fund, which he continued to manage, with great fidelity and ability, for fifteen years. He served as Treasurer of Yale College from 1782 until his death, in 1832. He was well constituted, morally and mentally, to receive instruction from the events which occurred, at home and abroad, from his youth to mature age, and to derive advantage from an intimate intercourse with the great men who were at that time entrusted with the administration of the government, in its various departments. His party associations were with the Federalists of Washington's days; but his natural temperament forbade his being a bigoted or ardent partisan. He was so constituted that he could not but adopt and act on opinions shown to him to be correct, by the light of experience shining on the present and into the future, and such opinions as he adopted might be as safely taken on trust by the people of the United States as those of any other man.

His amendments consist of seven clauses, or articles, all, taken together, intended to preserve the Republic from the effects of party spirit; to give a more free course to the will of the people; and to prevent frequent changes in the measures and policy of the government. These articles were, in substance, —

1. That the members of the House of Representatives should be elected to hold their offices for one year only.

2. That the Senators should be elected for three years, and should be divided into three classes, the first class to remain in office one year, the second two, and the third three years.

3. That, at the close of the term of each class of Senators, a President should be appointed, by lot, from the class whose term then expires, and should hold the office one year.

4. That the salary of the President should not exceed fifteen thousand dollars.

5. That the office of Vice-President should cease, and the Senate should choose a presiding officer.

6. That the advice and consent of the House of Representatives, as well as of the Senate, should be necessary to make appointments. "But Congress may by law vest the appointment of such officers as they shall think proper in the President, by and with the advice and consent of the Senate; and of the inferior officers in the President alone, in the courts of law, or in the heads of departments. But no law vesting the power of appointment shall be for a longer term than two years."

7. That no officer should be removed without the consent of the Senate and House of Representatives, unless the power to remove should be expressly granted by a law of Congress; but that the President might suspend an officer and appoint another to perform his duties, until a decision can be had by the whole appointing power.

The most important of these clauses is that which provides for the appointment of President by lot. Against this, on the first perusal, a majority, doubtless, will decidedly object.

With a full belief that such would be the case, its distinguished author boldly proposed it for the consideration of his fellow-citizens — not expecting that it would be at once adopted, but fully believing that the future working of our political machinery would show it to be necessary, as a balance wheel, to regulate its motion. When proposed, no politician advocated it; the managers of elections did not believe in it; a few commended it; and among them, as its author informed us, were the two most eminent judicial functionaries of the time.

The objections to this amendment are obvious and powerful; but not too powerful, as Mr. Hillhouse thought, to be countervailed by its advantages. The most obvious is, that it is a departure from the elective principle — one of the fundamental doctrines of republicanism.

But it departs from it only in regard to a single officer, and adheres to it in two of the three steps in the process of electing him. The people are to elect the State representatives, and these are to elect the Senators, from among whom the President is to be appointed. The government would still rest on the elective principle, as its foundation, which would prevail as the rule, with but this single exception.

It was a remark of the Cardinal de Retz, that the leading, original principle of a government or political system always becomes the cause of its destruction; that its vivifying virtue becomes its fatal vice. This remark deserves to be well considered by our patriots and statesmen. If confirmed by history, as it is by the operation of natural laws of the physical world, the same wisdom which dictated it would counsel a modification of a fundamental principle of our institutions upon the appearance of well-defined symptoms of its destructive tendency. The proposed amendment would seem to be the modification or corrective that would be most appropriate and efficient.

Another obvious objection to the amendment is, that it would not always secure the best talents. It certainly would not; it could only be relied on to obtain talents of a high order, though it might obtain the highest. The beautiful theory that, if the people were allowed to choose their rulers, they would raise the best talents to the highest offices, prevailed at the time of the institution of an elective government here; but experience has not sanctioned the theory. It has, on the contrary, conclusively established the fact that the best talents, and the highest merits, are not always available by means of the elective principle.

And why are they not available? It is not because they are feared or distrusted by the people. The people venerate intellectual ability, and delight to do it homage, even when accompanied, as it too often is, by minor moral delinquencies. If left to themselves, they would crown it with the highest honors, and deem themselves honored in doing so. But inferior men, — busy, selfish politicians, — cannot endure a great man above them in station; they cannot so easily control him; he is within the reach of their envy, but not of their flattery or seductive arts; and it is this class of men who, through the press, scatter charges against their superiors, destroy their popularity, and, by means of combinations, control nominations.

We can think of no other objection to this amendment than these two, and it may be doubted whether the last deserves as much weight as has been given to it; whether, in fact, it may not be insisted that the probabilities are in favor of obtaining, by lot, from the Senate, men better qualified for the office of President than such as are obtained through the medium of conventions. On the recurrence of the year, when a Senator is to be chosen from any

State, the people, less inflamed than now by party spirit, would take care to send to the State Legislature their best men to perform that duty; these, when they choose a Senator, would have especial reference to the high duties which he may be called on to perform; and he, during his whole term, — prompted as well by self-respect as by duty to his country, — would strive to qualify himself for the post to which fate or Providence may raise him. That one well qualified for the Presidency will generally, if not always, be obtained in this way, cannot admit of doubt; that the one the best qualified in the nation may now and then be obtained, through the medium of conventions, to possible, and that is all.

In looking for arguments in favor of the amendment, the first that presents itself is, that it will deprive party spirit, — "that demon which has engendered the factions that have destroyed most free governments," and from which we have more to fear than from any and all other sources, — of all power to do evil or to prevent good. The office of President is now the chief rallying point of party. A presidential election is the only occasion which can bring forth and array all the electioneering artillery of the country. Elections for State officers have reference to it; and the contests become more earnest and bitter as it approaches. Filling that office, in the mode proposed, will withold from party spirit all the aliment that nourishes its venom. How important this argument is, those who have observed the increasing influence of that bane of republics, for the last third of a century, have the means of forming an opinion for themselves.

It is not supposed that party spirit would be entirely extinguished. There can be no hope or wish that it should be. That parties, distinguished from each other by difference of principle, and by preference of different measures, are the safeguards of liberty, is as true as that infuriated party spirit, exasperated by debasing struggles for office, tends to destroy it. There will be always, in a free country, — and there always should be, — enough of party spirit to keep public attention awake and active; the atmosphere fresh and clear; but no duty is more imperative than to guard against that excess of it which tends to convulse the whole political system.

It is another argument in favor of the amendment, that it will deprive of all influence that class of politicians who

manage conventions and designate candidates for the Presidency. This class has been brought into being by our system of caucuses and conventions. These, on their first introduction, were denounced by many as dangerous innovations, calculated and intended to limit freedom of choice, and adapted to destroy that sense of personal responsibility so essential to the elevation of man and to dignity of character. They were, however, slowly introduced, and used as convenient, if not necessary, modes of concentrating the opinions and wishes of parties; and they have now become the instruments of intriguers. These act entirely independent of the people; are few in number, — often unknown, and generally unworthy of confidence. They are prompted to act, not by public considerations, but by personal interests and passions. Nevertheless, it is they who decree what man shall be nominated; the convention registers their decree; and the party in whose name the convention is held, feels constrained to carry the decree into effect. The people are thus placed in a position as uncomfortable, undignified, and degrading as can well be imagined. It has, in fact, come to this, that we must trust to intriguers, or to Providence, for our Presidents.

Other arguments in favor of the mode of appointment by lot are —

That it would be prompt; and by its promptness the excitement of angry passion, by a protracted contest, would be prevented.

That it would be certain, and by its certainty all the evils of a contested election, and all those arising from a failure to elect, would be avoided.

That it would afford security against all usurpation, for no scheme of ambition could be contrived and executed in the short period of a year, especially if the power of removal should be taken from the President.

That it would give to the Republic a President unfettered by pledges and unbiased by aid received in electing him.

Most of the other amendments were proposed to render the Constitution consistent throughout, should that which has been discussed be adopted. Yet neither of them, it seems to us, would be unwise if that should fail. The effect of all of them would be to diminish the power of the President, and increase that of the people, or their representatives. We believe that many of those who, in the early days of this government, were in favor of a strong

executive, afterwards, — especially when the list of revolutionary patriots was exhausted, — became convinced that more danger was to be feared from that source than from leaving a greater share of power with the people. Whether representatives are chosen to serve two years, or one, can be of but little consequence. Very few, if chosen to serve for one year only, would serve less than two. It is true that the longer they remain in office the more capable they become of performing their duty; but it is also true that the danger is greater that they will surrender their independence to the dispenser of offices.

The amendment which fixes the salary of the President at fifteen thousand dollars a year ought to be adopted, not because the nation cannot afford to pay ten times that sum, nor because the services of a President, — if they can be measured at all by money, — may not be worth ten times that sum; but because the more we give above that sum, the less faithfully and efficiently will the country be served, and a less amount, in fact, will the President be able to save. It is well known that the present high salary is given to enable him to live splendidly and hospitably — in a style somewhat resembling that in which the sovereigns of Europe are accustomed to live; and he feels bound to do so. This has had a tendency to make our government one of show and etiquette rather than of business and duty, and has subjected us to the charge and the ridicule of acting inconsistently with our professions of republicanism and simplicity.

Experience impressively counsels some alteration in the mode of appointment to office, but whether that proposed by Mr. Hillhouse is the best that can be devised may be questioned. To give the President the privilege of nomination in all cases is giving him too much. To require the assent of the President, Senate, and House of Representatives to all appointments, seems unnecessary. The suggestion that the people shall be allowed to choose certain classes of officers, is worthy of consideration. To the President and Senate may be given the appointment of all foreign ministers and consuls; to the President and both Houses the appointment of judicial officers and heads of departments; to the President and House of Representatives the appointment of all revenue officers. Some such distribution as this would equalize the powers and duties of the two Houses, and be in harmony with other provisions

of the Constitution. To give the appointment of the heads of departments to the Senate and House of Representatives would be inconsistent with European notions; but, as these notions are derived from forms of government prevailing there, and very different from ours, a logical process of reasoning would lead to the conclusion that it would be expedient in this Republic. The opinion often expressed, that the President ought to be allowed to select his own advisers, must be founded on the assumption that his integrity is above suspicion, his abilities unsurpassed, and his patriotism ardent and pure. They are placed around him to be his advisers, not his instruments. No State Constitution allows the Governor to appoint and remove his councillors.

That the power of removal ought not to be exercised by the President alone is already, we are persuaded, the opinion of a great majority of the people, indeed of all, except of those who are earnest in the pursuit of office; and, perhaps, we might except another class, not very numerous, — those who believe that the concentration of power in a single chief magistrate constitutes the most perfect form of government, and who delight to contemplate the administration of a Trajan, an Alfred, a Napoleon, and a Washington. In almost all cases the exercise of this power of removal is prompted by favoritism merely; not in one case in ten is the office from which a removal is made filled by a better man; every instance tends to exasperate party spirit, rendering more eager the struggle for office, for the sake of the emolument. But this is not all, nor the worst. On this topic Mr. Hillhouse thus speaks, in his "Explanatory Remarks:" —

"Though no express power is given by the Constitution to the President, to remove from office, it has been assumed and exercised in a manner which gives to the President almost the absolute power of appointment; for having the power to fill vacancies which take place during the recess of the Senate, (the persons so appointed to hold their offices to the end of the next session of the Senate,) and having exercised the power of making vacancies at pleasure, by removal from office, no appointments, made by and with the advice and consent of the Senate, can continue more than one day, or while the Senate continue their session, if the President is pleased to exercise his power of removal. A tremendous power this, which will enable the President to remove every officer of the army, from the

commanding general down to an ensign, at pleasure; to appoint and grant commissions to his partisans, to continue in force to the end of the next session of the Senate; to remove all civil officers, the judges only excepted, and to make new appointments for the same term; thus having the absolute command both of the sword and the purse, a sufficient length of time for an enterprising, ambitious man to execute his purposes, especially after having had two or three years to mature his plans.

"I have never been able to persuade myself that the framers of the Constitution, whose great aim was to give *security* to our nation's rights, and who have so carefully guarded all the lesser avenues to the Temple of Liberty, against the unhallowed footsteps of usurpation and despotism, should not only have thus left wide open the principal gate, but have delivered into the hands of such an assailant the key of the temple, and the very sentinels placed to guard the entrance."

Many consider our Constitution too sacred to be touched. It was made, they say, by the wisest and the purest of men, and he who should profess to be wiser than they would furnish good reason for doubting his own wisdom. It would be unsafe to alter an old, or to introduce a new, provision; it might destroy the harmony of its parts, and cause more evils than it would cure.

But our Constitution is not what its framers made it, and evidently does not work as they intended it should. They prescribed a complicated mode of electing a President tending towards, if not approaching near, an appointment by lot. This has been altered professedly to give the people an opportunity to decide who should be President and who Vice-President, but, in fact, giving the power of decision to a few, whom ambition or self-interest might prompt to interfere. If, at that time, the mode of appointment had been altered to appointment by lot, the alteration would not have been going farther in one direction than the step actually taken has gone in another.

Moreover, the Constitution has been altered by the construction which has been given to it, that the President may remove any officer whom he may wish or be persuaded to remove, even in cases where no unfaithfulness or incompetence is alleged, thus making a vacancy which he himself may fill. This has conferred on him a tremendous power; more despotic in its nature and more efficient for

evil than all the powers expressly granted to him in the Constitution.

As to its working, the members did not foresee the introduction of authoritative conventions to nominate candidates, which completely nullifies the provision imposing on electors the duty of appointing a President, and leaving them as free, and of course sacredly bound, to perform that duty, according to their convictions, as any citizen is free and bound so to give his vote at the polls. Their reason for making this provision doubtless was, that it would be impossible for one in a hundred of the voters to be acquainted with all or even most of those throughout the Union qualified to be President, but they might be sufficiently acquainted with citizens of their own State, who knew more than they of the great men of the Republic, and whom they might be willing to trust to give the vote of their State. And the members might have deemed it expedient to prolong, to as late a day as possible, the uncertainty as to who would be electors, and who would be voted for, so that as little opportunity as possible should be afforded for intrigues and combinations.

Could the members of the Convention be now summoned to consider again the subject communicated to them in 1787, would they not say to us, "We do not claim for the Constitution that sanctity which many others claim for it; it is not the Constitution which we formed; and even if it were, the circumstances to which it then had relation are essentially altered. Your limits have been extended far beyond our anticipation, a significant fact, and quite too important to be kept out of view when the exercise of the right of universal suffrage, in the choice of a chief magistrate, is the subject of consideration; your population is quintupled and more, and much of it has been received from foreign sources; party spirit is continually acquiring intensity and influence; a new political power has arisen in the Republic, to regulate or restrain which we, of course, made no provision. The Past, it is true, has claims on the Present; but if danger threatens from any quarter, — if Time, that great innovator, has worked unexpected changes — it is the duty, as well as the right, of the Present to take care of itself, and of the Future."

Very soon after these proposed amendments and the "Explanatory Remarks" were published, John Adams, of whose revolutionary services we trust no one needs to be

reminded, wrote a review of both, which has recently been published by his grandson. The review is written in the same forcible style for which the author was remarkable in his youth, and teems with historical facts and theories of government, for which many of his early productions were distinguished. Giving full credit to Mr. Hillhouse for integrity of purpose, he condemns his propositions, and the reasons given in support of them, as directly and distinctly as he could well find words to do.

The fondness of Mr. Adams for disputation led him to devote more attention to the "Explanatory Remarks" than to the proposed amendments. In the former, he found political theories which he desired to refute, and a definition of aristocracy which did not agree with his own early notions. When he comes to speak of the amendments, he remarks of the first two, by which the representative and senatorial terms were to be shortened, "This instead of diminishing the spirit of party, will only increase and inflame it. There will be no time for it to cool."

But is it the frequency of elections, or their importance, that inflames party spirit? Would even the importance of the election, or of the office to fill which the election is held, tend much to inflame party spirit, if a multitude of other officers were not dependent on it?

To enable the reader to perceive the feeling with which Mr. Adams examined and commented on the amendments, two other extracts will be given.

"The sixth article (and seventh) of Mr. Hillhouse's amendmends reduces the President's office to that of a mere Doge of Venice, a mere head of wood, a mere tool of the aristocracy of the country. He is to be appointed by chance from the most aristocratic branch — the Senate. Although the Senators in general have been respectable men, and some of them illustrious for virtues, talents, experience and services, yet it must be confessed that there have been very weak men in that body. These will have as good a chance as the best. A Blount or a Burr as good a chance as an Ellsworth, or a Strong or a Richard Henry Lee. But this is of less importance than the proposal to submit all nominations and removals to the Senate and House of Representatives. There never was, and never can be, a project more aristocratical than this."

This objection is strongly stated, but its real force depends on the truth of the assumption, that the Senate

constitutes an aristocratic branch of our government, or that there is an aristocratic class in the nation. On this point Mr. Adams and Mr. Hillhouse differ. The latter says: —

"To form an aristocracy, privileged orders and hereditary succession are indispensable. The moment you limit the privilege, in its duration, to any period short of life, or admit the popular voice in its creation, by subjecting it, at regular periods, to a popular election, it ceases to possess the necessary attributes of aristocracy. The United States do not possess the materials for forming an aristocracy. We have no privileged orders; nor should we readily consent to make a selection of men on whom we would confer such privileges, and agree that they should enjoy them as a right of inheritance."

But allowing that Mr. Adams is correct in his assumption, it is difficult to perceive how the amendments can reduce the President's office to "a mere tool of the aristocracy of the country." They allow the Senate to participate in the power of removal; and that is all the additional power they give to that body; and this is more than neutralized by the additional powers given to the democratic branch, the House of Representatives. The Senate, therefore, would not be relatively strengthened; but it is true that the monarchical branch, the presidency, would be relatively weakened; and it was this, probably, which aroused in the bosom of the ex-president feelings which prompted him to speak in strong language of censure.

It is fortunate, perhaps, that the recent publication of Mr. Adams's Review has again brought the amendments proposed by Mr. Hillhouse to the consideration of the few now living who remember them and their author; and has presented them, for the first time, to the younger generation now active on the stage. It cannot be supposed that they will receive, at once, the approbation of many. By most the appointment of the President by lot will be considered as a surrender by the people of an important right; but it is a right the possession of which, exercised under the dictation of an irresponsible convention, is an occasion of mortification rather than of pride; and this instance would be but one among many in which man has surrendered rights for his own advantage. And when all of the amendments are taken into consideration, it will probably be found that more would be acquired or regained

than would be parted with. There are certainly good reasons for believing that they would cure the sorest of ills that afflict us. They well deserve, from the eminence of their author, to be read without prejudice, to be kept in mind and considered in connection with the developments and changes which have taken place in the last quarter of a century, and such as shall take place in an equal period of the future.

Recent American Decisions.

District Court of the United States for the Northern District of New York, Nov. 10, 1852.

In Admiralty.

THE STEAMBOAT NORTHERN INDIANA, THE MICHIGAN SOUTHERN RAILROAD COMPANY, claimant and respondent.[1]

Running a steamer of fifteen hundred tons burden at the rate of seventeen miles an hour, along a track frequented by sailing vessels, when it is impossible, in consequence of a thick fog, or the darkness of night, to discern an approaching vessel in time to avoid running her down, is, of itself, conclusive evidence of such gross negligence or culpable recklessness, as to render the steamer liable for all the damages occasioned by a collision between such steamer and another vessel; unless it is clearly proved that those in charge of the other vessel were also in fault.

In a night so light and clear as to render that degree of speed justifiable, the fact that a collision with a close-hauled schooner occurred while the latter displayed a plain light and the signal lights required on the northern and north-western lakes by the act of Congress, is enough to cast upon the steam-vessel the burden of establishing, by satisfactory evidence, that there was a want of care or skill on the part of those in charge of the steamer.

Where a steamer, under a full head of steam, is about meeting a close-hauled schooner in the open lake — their courses being nearly opposite — the duty of checking speed and changing direction devolves upon the steamer alone, and the schooner has the right, and it is ordinarily her duty, to keep her course.

The want of a look-out, detailed and stationed for the constant performance of that particular and specific duty, is, of itself, a circumstance of a strong condemnatory character, and in case of collision, exacts from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered, was not attributable to her misconduct in that particular.

The mate, while the officer of the deck, and holding the temporary command of a steamer of fifteen hundred tons, is continually liable to be

[1] There were other libels against the boat tried at the same time, but it is unnecessary to give their names.

called to the discharge of duties incompatible with the keeping of a constant and vigilant watch during the darkness of the night, and ought not to be relied on for that purpose. For such purpose he would ordinarily be less reliable than the man at the wheel, when specifically charged with that additional duty, and it is well settled, that the wheelsman is not a sufficient look-out for such a vessel, under such circumstances.

The inside of the pilot-house, on board of such a steamer, is not, in a dark night, the proper position for a look-out.

When the officer in charge of a steamer discovers the light of another vessel, and that there is danger of a collision, and cannot, by reason of darkness or fog, determine her position or her course with sufficient certainty, to enable him to decide what change should be made in the steamer's helm, he should slacken, and, if necessary, stop and reverse his engine, so as to diminish the speed of his vessel, until he is able to determine what change of direction will prevent a collision; and a failure to do so, connected with an improper order for the change of the helm, given in ignorance of the course and position of the other vessel, will render the steamer liable.

The cases of *St. John* v. *Paine*, (10 How. Rep. 557,) and *The Propeller Genessee Chief* v. *Fitzhugh, et al.*, (12 Ib. 443,) referred to, and their doctrines applied.

It is no answer to proof of an excessive and unjustifiable rate of speed on the part of a steamer, while running, in a dark night or in thick weather, along the track of sailing vessels, that a reduction of speed would subject the steamer's owners to penalties for a non-performance of their contract with the post-office department. No contract with a public office, and no considerations of increased convenience can justify a rate of speed highly dangerous to the lives and property of persons pursuing their lawful business on the same route.

No precise rate of speed can ever be prescribed. It must depend upon the locality and the particular and peculiar circumstances of each case; but it must not be such as cannot be maintained without probable injury to the lives and property of others.

Hall, District Judge.—Considerable time having elapsed since the argument of these causes, I have examined, with great care, the very full minutes of testimony taken by me at the hearing; and have endeavored to ascertain, with as much certainty as practicable, the material facts upon which the rights of the parties depend.

The testimony, as in most cases of collision, is indefinite and conflicting; and in respect to questions of time and distance, necessarily conjectural and uncertain; but the most important questions of fact which arise in the case may, perhaps, be determined with quite as much certainty as in most cases of this character.

The libellants in these causes seek to recover the damages sustained by them, respectively, in consequence of a collision between the steamboat Northern Indiana and the schooner Plymouth on the 23d day of June last. The libellants in the suit first above entitled, were the owners

of the Plymouth; and the libellants in the other cases, respectively, were the owners of portions of her cargo.

The collision occurred on Lake Erie, about twenty-five miles northerly from Cleveland, Ohio, about one o'clock in the morning. The schooner sunk a few minutes after the collision, and, with her cargo, was totally lost.

The witnesses differ somewhat widely in reference to the direction and force of the wind, the darkness of the night, and the density of the haze upon the water. The darkness and haze are represented by the respondent's witnesses to have been so thick as to prevent them from seeing the schooner in time to avoid the collision; while those on board the schooner declare that the night was clear, with only a few small scattering clouds to obscure the bright star light, and that the haze upon the water was so slight as not materially to obstruct the view of an approaching vessel.

There was no moon, and the night was not entirely clear; but from the whole evidence it may be safely assumed — notwithstanding the slight haze upon the water — that the night was not so dark, nor the weather so thick, as to render it impossible for those on board the steamer to discern an approaching vessel in time to avoid a collision; nor so light as to excuse the slightest want of that sleepless vigilance and watchful care which the law requires of those having charge of the direction and speed of a steamer of the great size and power of the Northern Indiana.

The wind was blowing freshly, and the lake was somewhat rough. The steamer was making about seventeen miles, and the schooner about seven and a half miles an hour, at the time those on board of each discovered that there was danger of collision with the other. The steamer was therefore running about fifteen hundred feet, and the schooner about six hundred and sixty feet per minute.

The steamer was three hundred feet in length, and of the burden of about one thousand five hundred tons. The schooner was one hundred and four feet in length, and of the burden of one hundred and ninety-seven tons.

The Plymouth was proceeding from Huron, in the State of Ohio, to Buffalo, New York. She was fully laden with wheat, flour, &c., and was steering N. E. by E., with all sails set. The wind was from the N. N. W., but was variable — veering from time to time a point or two to the northward. The schooner was therefore running by the

wind, within a point or two of being close-hauled, and with her larboard tacks aboard. She carried the necessary lights, and was in all respects seaworthy and sufficiently manned.

The alleged courses of the schooner, with due allowance for lee-way, would probably have brought her to the place of collision; and it is therefore assumed that her courses, by the compass, were correctly stated by her captain and wheelsman.

The steamer was proceeding from Buffalo via Dunkirk, to Monroe, Michigan. About ten o'clock the previous evening, when a little below Ashtabula, and about five or six miles from land, her captain determined to proceed direct for the middle passage at the Islands. The course of the steamer was therefore changed to S. W. by W. three-fourths West, as stated by those having charge of her direction. They also state that this course was not changed until the danger of a collision became apparent.

The steamer's course from the point where her direction was thus changed, (judging from the chart produced on the trial, and conceded to be correct,) should probably have been nearly W. by S. It was, however, stated by her captain that the compasses of different steamers frequently differ one or two points, and it will therefore be assumed that the course of the steamer, as indicated by her own compass, was correctly stated by the respondents' witnesses. Her real course must nevertheless have been nearly W. by S. to have brought her to the place of collision, and this direction would have brought the two vessels somewhat nearer the angle at which they struck. The difference is, however, so small as not materially to affect the rights of the parties.

The schooner was struck on her starboard side, about amidships, and nearly at right angles. The stem of the steamer was driven nearly to the centre of the deck of the schooner, which soon sunk, and schooner and cargo were totally lost.

In my judgment these general facts are fully and satisfactorily established by the evidence. Portions of the testimony, bearing directly upon the questions raised by the respective parties, will be hereafter stated somewhat in detail, and will be considered in connection with the general facts above stated. This testimony will be deemed more or less reliable, as it is consistent, in a greater or less degree, with the conclusions already drawn from the whole evidence in the case.

In the view which I have taken of the case, it is unnecessary to examine in detail the testimony in respect to the darkness and haze, which, it was claimed by the persons on duty on board the steamer, prevented an earlier discovery of the schooner. I hold it to be unquestionable that running a steamer of one thousand five hundred tons burden, at the rate of seventeen miles an hour, along a track frequented by sailing vessels, when it is impossible, with the greatest care and vigilance, to discern an approaching vessel in time to avoid running her down, is, of itself, conclusive evidence of such gross negligence, not to say recklessness, as to render the steamer liable for all the injury caused by a collision; unless indeed the other party is clearly in fault.

The respondent's case is full of difficulty upon either view of the testimony. If the night was so thick and dark that the schooner could not, with proper care, have been discovered in time to avoid the collision, the steamer's liability necessarily follows the proof that she was running at the rate of seventeen miles an hour; and if the night was so light and clear as to render that degree of speed justifiable, the fact that the collision occurred while the schooner was carrying a plain light on her jib-boom, and a green signal light on her pawl-bitts, is enough to cast upon the respondent the burden of establishing, by the most satisfactory evidence, that there was no want of care or skill on the part of those in charge of the steamer.

It cannot be necessary to refer to authorities to sustain these propositions, or to discuss, at much length, the several questions raised in these cases; but the alarming frequency of collisions and accidents upon Lake Erie, and the manifest want of care and skill disclosed by the evidence in these cases and another tried at the same session of this court, will perhaps justify the citation of English and American authorities, and a more full discussion of some of the questions presented. This discussion, it is hoped, may lead those engaged in lake navigation to inquiry and reflection; and to the exercise of that extreme care demanded alike by public safety and private interest.

Before proceeding to the examination of the grounds upon which the libellants rest their allegations of negligence and misconduct, against those in charge of the steamer, I shall consider that branch of the respondent's

defence which claims that the negligence and misconduct of those who had charge of the schooner, either caused the collision or contributed to produce it.

It was contended by the respondent, that the libellants were not entitled to a decree because the proof did not show that the schooner exhibited the necessary lights prior to and at the time of the collision; and because the schooner did not change her course in time, and avoid the steamer; especially as the look-out and wheelsman of the schooner saw the light of the steamer fifteen or twenty minutes before the collision, and made no effort to avoid her, until it was too late to escape, by a change of the course of the schooner.

The captain, wheelsman, look-out man, and one of the seamen of the schooner, swear distinctly that they saw the lights on the jib-boom end and pawl-bitts, and that they were burning immediately before, or else after, the collision, and if these four witnesses are to be believed, the schooner's lights were unexceptionable. And these witnesses are to some extent corroborated by the witnesses of the respondent. The mate of the steamer swears that he saw the schooner's light shortly before the collision, and the wheelsman of the steamer also swears that he saw the plain or jib-boom light a little more than a minute before the collision occurred. Upon this evidence I cannot doubt that the schooner's lights were sufficient; and this point of the defence is therefore overruled.

That the schooner's course was not departed from — that those on board made no effort to avoid the collision until the helm was changed after the danger became imminent and unavoidable, is doubtless established by the evidence. It therefore becomes necessary to inquire, what was the duty of the schooner under the circumstances?

The two vessels were about meeting in the open lake — their courses were nearly opposite — there being at most but about two points between them — the steamer under a full head of steam, and the schooner nearly close-hauled. In my judgment it was the right of the schooner to pursue her course and the duty of the steamer to avoid the schooner, if the night was such as to enable those on each vessel, by keeping a vigilant watch, to determine, in due time, the position and course of the other. The evidence satisfies me that this might have been done on the night in question, and that the collision was caused by negligence

and inattention, and not by a reckless determination to maintain an immoderate speed when it was impossible to discover a vessel or her lights in time to avoid a collision.

The movements of a steamer are always under control. Her course can be changed at will, and much more readily than that of a close-hauled sailing vessel; and her motion may be checked, or even reversed, in an almost incredibly short space of time. The first engineer of the steamer stated, on his examination, that when the steamer was running at the rate of seventeen miles an hour, the proper signals for checking, stopping and backing, could be given through the bells, the wheels reversed, and the speed of the steamer so far checked, as not to injure a vessel by collision, while the steamer was running twice and a half or three times her length, (750 or 900 feet) and that if running at the rate of twelve miles an hour, only two thirds that number of feet would be required for that purpose. In this case the speed of the steamer might have been so checked after there was not more than one thousand feet between the vessels as to prevent the collision, or to so diminish its force as to render the damage comparatively trifling; and with no more than two or even four points between the courses of the two vessels, the course of the steamer might have been so changed, when not more than six hundred feet distant, as to have avoided this small schooner.

I shall therefore hold that the duty of checking speed and changing direction, to avoid a collision, devolved upon the steamer alone, and that the schooner had the right to keep her course. The cases of *The Perth*, (3 Hag. Rep. 414;) *The Iron Duke*, (2 W. Rob. 377;) *The Rose*, (Ib. 1;) *St. John* v. *Paine et al.* (10 How. 557;) *The Propeller Genesee Chief* v. *Fitzhugh et al.* (12 Ib. 443;) are deemed abundant to sustain this position.

In the case in the 10th Howard, the court declared (p. 583) that steam-vessels are regarded "in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances. Their obligation extends still further, because they possess a power to avoid the collision not belonging to sailing vessels even with a free wind; the master having the steamer under his command, both by altering the helm and by stopping the engines. They are also of vast power

and speed compared with craft on our rivers and internal seas propelled by sails, exposing the latter to inevitable destruction in case of collision, and rendering it at all times difficult, and not unfrequently impossible, to get out of their way. Greater caution and vigilance are therefore naturally to be exacted of those in charge of them, to avoid the dangers of the navigation. This justly results from the superior power to direct and control the course and speed of the vessel and the serious damage consequent upon a failure to avoid the dangers. As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her. *The Shannon*, (2 Hagg. Adm. 173;) *The Perth*, (3 Ib. 114;) *The Rose*, (2 Wm. Rob. 1;) *Hawkins* v. *The Duchess and Orange Steamboat Co.* (2 Wend. 452; 3 Kent's Com. 230;) Abbott on Shipp. 228, (Boston ed. 1836.)

"By an adherence to this rule on the part of the sailing vessel, the steamer with a proper look-out will be enabled when approaching in an opposite direction to adopt the necessary measures to avoid the danger, as she will have a right to assume that the sailing vessel will keep her course. If the latter fails to do this, the fault will be attributable to her; and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision under the unexpected change of the course of the other vessel, and the circumstances of the case."

Another complaint, in respect to the management of the schooner, rests upon the allegation that her wheelsman put his helm up, after the danger became imminent. — This fact was established by the testimony of the wheelsman himself. But he also swore that it was not done until the danger was imminent, and that there was not sufficient time after that, and before the collision occurred, for the schooner to have answered her helm. The other testimony of the case is strongly corroborative of the wheelsman on this point, and there is certainly no reason to suppose that putting the helm up changed the course of the schooner to such an extent as to produce, or aid in producing the collision. It may also be observed that the helm was changed under circumstances similar to those referred to by Chief Justice Taney in the case of *The Genesee Chief* v. *Fitzhugh et al.* (12 How. 461,) when he said, "Nor do we

deem it material to inquire whether the order of the captain at the moment of the collision was judicious or not. He saw the steamboat coming directly upon him; her speed not diminished nor any measures taken to avoid a collision. And if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought; and she is responsible for the consequences. She had the power to have passed at a safer distance, and had no right to place the schooner in such jeopardy that the error of a moment might cause her destruction, and endanger the lives of those on board. And if an error was committed under such circumstances it was not a fault."

It was also contended by the advocates of the respondent, that they had proved by their own wheelsman that the wheelsman of the schooner stated after the collision that "he put his helm down — he believed it would have been better if he had kept his helm up; and he believed if he had done so, the vessel would not have hit." This was denied by the wheelsman of the schooner, who stated that he kept his helm up, (after it was changed, when the danger became imminent,) until the vessels struck, and then put it down; and that he did not tell the wheelsman of the steamer that he put his helm down and changed the course of the vessel before the collision. The evidence in regard to the swinging of the schooner after the collision, and her present position, as she lies in the water, — the change of the helm of the steamer, and the angle at which the vessels struck, — render it quite clear that whatever change was made in the schooner's helm, her course was not altered to such an extent as to contribute to the production of the injuries of which the libellants complain.

Having thus disposed of the question of negligence or misconduct on the part of those navigating the schooner, it becomes necessary to inquire whether the collision was the result of inevitable accident or of negligence, misconduct, or want of skill on board the steamer.

The evidence on the part of the claimant shows that the mate of the steamer had charge of her deck at the time of the collision; and that he, together with the wheelsman, was in the pilot-house when they first discovered the lights of the schooner. The wheelsman was at the wheel, and the mate was sitting at an open window, at the right of the

centre of the forward part of the pilot-house. The mate and wheelsman agree in stating that when they first discovered the schooner's light it was about a point or a point and a half to the larboard of the schooner's course, and also in stating that they suppose the schooner was then some four hundred and fifty feet from the steamer. They declare that the night was dark and the weather thick; that there was a haze upon the water; and that a vessel's light could not be seen more than a quarter of a mile. The mate swears that the moment he saw the light, and before he ascertained the course of the schooner, he ordered the helm hard a-port — saw the wheelsman commence executing his order — and then passed around the wheel, went out on the opposite side of the pilot-house, and on to its top — that he then first saw the vessel which he had been unable to see when sitting in the pilot-house; that he thereupon instantly rung the bells for checking and backing the engine; and that he knew the wheels had been reversed before the collision, because he saw in front of the wheels the white foam caused by their reversed motion.

The watchman's statement is not only different but extraordinary. He swears that he was standing on the larboard side of the lower deck, about thirty-eight feet aft from the cutwater, and had been there about two minutes before the collision, looking nearly in a straight direction ahead, but along the larboard bow. That he was looking out for obstructions; that he saw no light, but saw the schooner, and that it did not exceed a minute from the time he saw the schooner to the time of the collision; that the moment he saw the schooner he heard the engine bells ring — first, three taps to check, then one to stop, and then one to back the engine; and that the engine was stopped half a minute before the collision; and yet he swears that he does not think the schooner was more than her length (one hundred and four feet) from the steamer when he first saw her.

On his cross examination, he swore that the backing bell rung half a minute or a minute before the collision, and also that he thought the speed of the steamer was lessened nearly one third after the wheels were reversed before the collision occurred.

The first engineer of the steamboat swears that he was about twenty-five feet from the engine when the engine bell first rung; that the bells for checking, stopping, and backing were rung in quick succession, and answered as

rapidly as possible by himself and the third engineer; that after the wheels were reversed, they made between one and a half and two revolutions backwards before the vessel struck, and that it would take a little less than a minute to make these revolutions.

The third engineer agrees with the first, in stating that the wheels made between one and a half and two revolutions after they were reversed and before the collision, and he states that it would take half a minute to make these revolutions.

There is some other testimony on behalf of the claimant, but it does not materially conflict with the testimony of the mate and wheelsman in respect to the position and proximity of the schooner when first discovered, or change the aspect of the case in reference to the sufficiency of the look-out, or the effort made to avoid the collision.

Upon the whole evidence, I am entirely satisfied that the collision was not the result of inevitable accident, but was caused by negligence and want of skill and care on board the steamer.

1. There was no sufficient look-out.

The steamer was running along a track where vessels are accustomed to meet, and in a night so dark as to render more than the usual precautions absolutely necessary. While the great speed of the steamer made it the imperative duty of those engaged in her navigation to exercise extraordinary vigilance to secure from danger the lives and property of others, pursuing their lawful business along the same route, the usual and ordinary precautions required in clear weather, and in nights not unusually dark, were not adopted.

The only persons on duty on board the steamer, at and immediately before the collision, were the first and third engineers below, and the mate, wheelsman, and watchman on the decks. The engineers were both out of the engine-room — the first engineer at the gangway, some twenty-five feet distant; and the third engineer was, as he states, just outside of the door and looking into the engine-room. The mate was in the pilot-house with and near the wheelsman, and the watchman was, as he says, on the forecastle deck, about thirty-eight feet abaft the stem.

The mate was the officer of the deck, and the wheelsman was employed in his proper duty at the wheel. The business of the watchman, who was called a "look-out"

by the advocates for the respondent, was stated by himself to be "to look out for the welfare of the boat in general — to look out for the fires, pumps, baggage, lights, and trimming of the boat — to look out ahead what time I have — to relieve the man at the wheel, or the mate, if he wants to leave the deck." The duties of such a "look-out" are altogether too general to be of any particular service in guarding against collision on board a steamer running in a dark night at the rate of seventeen, or even twelve, miles an hour.

The decisions of the Courts of Admiralty in England and of the Supreme Court of the United States, have declared, in distinct and explicit language, the necessity of "stationing," in the most appropriate position, at least one person to look out for approaching vessels.

It was declared by the Supreme Court of the United States, in the case of *St. John* v. *Paine et al.*, (10 How. 557,) "That a competent and vigilant look-out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, is indispensable to exempt the steamboat from blame in case of accident in the night-time, while navigating waters on which it is accustomed to meet other water craft." And it was added: "There is nothing harsh or unreasonable in this rule; and its strict observance and enforcement will be found as beneficial to the interests of the owners as to the safety of navigation; a remark equally true in respect to all other nautical rules which the results of experience have shown, enter so materially into the proper management of the vessel."

In the case of the *Propeller Genesee Chief* v. *Fitzhugh et al.* (12 How. 443,) Chief Justice Taney, in delivering ing the opinion of the same court, used the following language: "It is the duty of every steamboat, traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out, besides the helmsman. It is impossible for him to steer the vessel and keep the proper watch in his wheel-house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice, when it becomes necessary, to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-out was not stationed in a proper place, or not

actually and vigilantly employed in his duty, it must be regarded as *primâ facie* evidence that it was occasioned by her fault. She has the command of her own course and her own speed; and it is her duty to pass the approaching vessel at such a distance as to avoid all danger when she has room, and if the water is narrow, her speed should be checked so as to accomplish the same purpose."

The English courts require even greater vigilance. In the case of *The Europa*, (one of the Cunard steamers,) 2 English Law & Equity Reports, 557, the look-out was adjudged insufficient by the High Court of Admiralty, and the steamer condemned in damages, where a collision occurred during a thick fog, and in the path of vessels passing between England and this country: although it appeared that the second officer of the watch was on the bridge; a quartermaster on the topgallant forecastle; another quartermaster at the con, besides the quartermaster at the wheel; and this when the steamer was seen at a distance of twelve hundred feet, and was running only twelve and a half miles an hour, in the open sea, seven hundred miles from land.

The want of a look-out, detailed and stationed for the constant performance of that specific duty, is of itself a circumstance of a strong condemnatory character, and exacts in all cases from the vessel neglecting it clear and satisfactory proof that the misfortune encountered was in no way attributable to her misconduct in that particular. (The New York Legal Observer, vol. 9, p. 321; Ib., vol. 6, p. 341.)

No look-out was stationed on board the steamer, as required by the cases in our Supreme Court. The watchman, or man of all work, who esteemed it his duty to look out ahead only when he could find nothing else to do in discharging his other multifarious duties, was not a proper or sufficient look-out, even if he had the competent skill for that service. The mate was the officer of the deck, holding the temporary command of the vessel, and liable to be continually called to the discharge of duties inconsistent with the keeping of a constant and vigilant watch, and he ought not to have been relied upon for that purpose. In such a steamer as the Northern Indiana, his proper duties of officer of the deck would materially interfere with the attempted discharge of the additional duties of a look-out, and render him less reliable for that purpose than

the person at the wheel, who, it has been seen, is always held insufficient. If the officer of the deck assumes to act as the look-out, the proof must be clear and satisfactory that he was, during all the time a look-out was material, in the proper position, and constantly and vigilantly discharging that duty.

If the officer of the deck could be considered a competent look-out, he was not, in this case, in a proper position, and his conduct, as proved by his own testimony, is conclusive evidence that he was himself conscious of his neglect. When he discovered the schooner's light, and saw that there was danger of collision, he first ordered the helm hard a-port, and then left his seat in the pilot-house, (in which he could not then see the schooner or ascertain her course,) and hastened to a more elevated position better adapted to the purposes of a look-out, on the top of the pilot-house. When he reached that point, he could see the schooner, her relative position and direction, and then only did he ring the bells to slacken, stop, and reverse the engine.

But we are not left to our own judgment and that of the mate, in reference to the necessity of selecting a better position than the pilot-house as the station for the look-out. In addition to the language of Chief Justice Taney, already quoted, it was said by Mr. Justice Nelson, in delivering the opinion of the court in the case of *St. John et al.* v. *Paine et al.*, already referred to: "We are also satisfied that the steamboat was in fault in not keeping at the time a proper look-out on the forward part of the deck; and that the failure to descry the schooner at a greater distance than half a mile ahead is attributable to this neglect. The pilot-house, in the night, especially if dark, and the view obscured by clouds in the distance, was not the proper place whether the windows were up or down. The view of a look-out stationed there must necessarily be interrupted."

In the case now under consideration, there is direct evidence of the unfitness of the position for the look-out on board the steamer. While there the mate could not discover the schooner or determine her course, but he was able to do so as soon as he reached the top of the pilot-house. In the meantime, the steamer had proceeded with unabated speed, and her course had been changed in the wrong direction by an order given in ignorance of the course and exact position of the schooner.

2. The mate was clearly in fault in ordering the helm hard a-port.

The helm should probably have been ordered hard a-starboard, but as the mate could not, at the time he first descried the schooner, determine what order he ought to give the helmsman, he should have reduced the speed of the vessel at once, and as much as practicable, and only have given an order to change the course of the steamer after he had ascertained what order was necessary to prevent the collision. *The Perth*, (2 Hag. 414;) *The James Watt*, (2 W. Rob. 270.)

There is little doubt that this mistaken order of the mate, (especially as he neglected to reverse it when he subsequently discovered the course of the schooner,) was the real cause of the collision. If the steamer had kept her course, it is probable there would have been no collision; and I apprehend that there is not the slightest reason to doubt that if the helm of the steamer had been put hard a-starboard at the time the schooner was first discovered, the steamer would have passed under the schooner's stern, and the collision have been avoided. The contrary order caused the steamer to swing in such a manner as to present to those on board the schooner the appearance, as she proceeded on her way, of constantly changing her course, with a persevering determination to force a collision.

3. If, as was contended on the part of the respondent, the night was so dark, and the haze so thick, as to prevent those on board the steamer from descrying the schooner in time to avoid a collision, the speed of seventeen miles an hour, maintained by the steamer, was wholly unjustifiable, and rendered her liable for all damages occasioned by the collision.

It was suggested by the advocates for the respondent, that rapidity in travel, and in the transmission of the mails, was in accordance with the spirit of the age; and that reducing the steamer's speed in consequence of the darkness of the night, would have subjected her owners to penalties for the non-fulfilment of their contract with one of the departments of the national government; and, they asked, if they could not run seventeen miles an hour, how fast could they run? A full answer to the suggestion was given by Lord Ellenborough in a case where the driver of an English mail-coach was indicted at the Old Bailey for

manslaughter, he having run over and killed a man in the public street. It was urged in his defence that, by contract with the post-office, he was compelled to go at the rate of nine miles an hour. Lord Ellenborough, adverting to that defence in summing up, observed that no contract with any public office, and no consideration of public convenience, could justify the endangering of the lives of his Majesty's subjects; and this doctrine was properly applied by Dr. Lushington, in the High Court of Admiralty, in a case of collision. *The Rose*, (2 W. Rob. p. 1.)

No precise rate of speed can ever be prescribed. It must depend upon the locality and the peculiar circumstances of each particular case; but it must not be such as cannot be maintained without probable risk to the lives and property of others. *The Europa*, (2 English Law & Eq. Rep. 557;) *Newton* v. *Stebbins*, (10 How. Rep. 586 and 606.)

But even when the rate of speed may be justified if a corresponding degree of caution and circumspection be observed, a steamer will be held liable if all necessary precautions be not taken; and for the rate of speed maintained by the steamer on such a night as that on which this collision took place, the watch on board the Northern Indiana was, as has been shown, entirely insufficient. *The Europa*, (2 Eng. Law & Eq. Rep. 557;) *The Virgil*, (2 W. Rob. 201;) *The Itinerant*, (Ib. 236;) *Jones* v. *The Schooner Hanover*, (Legal Observer, vol. 9, p. 239.)

Upon the whole case, I conclude that the speed of the steamer was unjustifiable, if the darkness and haze were such as probably to prevent an approaching vessel from being discovered by a proper look-out in time to avoid a collision; that the look-out was clearly insufficient whether the night was as thick and dark as represented by the respondent's witness, or as clear and light as represented by the witnesses of the libellants; that the signals to check, stop, and back the engines should have been given when the schooner was first discovered; that the order to put the helm hard a-port was the reverse of what it should have been; that the neglect to give the signals to the engineers in time, and the mistaken order to the helmsman, were the natural results of the ignorance of the course and exact position of the schooner; and that that ignorance almost necessarily resulted from the neglect to station a proper look-out at the point to which the mate himself deemed it necessary to hasten when he found there was danger of a

collision. With these views of the case, I cannot fail to enforce the claims of the libellants, without disregarding not only the dictates of my own judgment, but also the decisions of the Supreme Court of the United States — decisions which it is my duty as well as my inclination at all times to respect and follow.

A strict adherence by the District Courts to the decisions of the Supreme Court, in the cases cited from the 10th and 12th Howard, will lessen the number of collisions and accidents upon our inland seas, and these decisions I shall deem it my duty to uphold and enforce while I have the honor to sit in this court.

Decrees for the libellants will be entered for the amounts mentioned in the statements handed to the clerk.

John Ganson, Proctor and Advocate for libellants.

Dennis Bowen, Proctor for claimant; *Rogers* and *Curtenius*, Advocates.

U. S. Circuit Court, Northern District of N. York.

THE STEAMBOAT NORTHERN INDIANA.

NELSON, J. — I have examined the pleadings and proofs in this case, and entirely concur with the very able opinion delivered by the learned District Judge in the court below; and in all the views there taken of it, and the conclusions arrived at.

It would be a work of supererogation on my part to again go over the case. The proofs are clear and decisive, that the collision occurred through the neglect and the want of the proper observance by the mate and hands on board of the Northern Indiana, of the familiar nautical rules in the navigation of the vessel on the occasion and under the circumstances in which it occurred, especially in not having a proper look-out at the time. If there had been one, there is nothing in the case to excite a reasonable doubt but that it would have been avoided. If it could not have been, the navigation of Lake Erie must be perilous indeed: so much so as to put at fault all the safeguards that skill and experience have constructed to prevent these marine disasters.

Supreme Judicial Court of Massachusetts, Hampden, ss., Sept. Term, 1853.

HENRY KING *v.* RALPH DEWEY.

Replevin — Jurisdiction.

An action of replevin cannot be maintained, in this State, for goods of less value than twenty dollars.

THIS was an action of replevin, and the facts in the case sufficiently appear in the opinion of the court, which was delivered by

MERRICK, J. — The goods replevied in this action were of less value than $20. For that reason the Court of Common Pleas, to which the writ was returnable, determined that it had no jurisdiction of the action, and ordered it to be dismissed.

Actions of replevin are authorized and provided for, and the whole course of proceeding in the commencement and prosecution of them to final judgment is carefully and minutely regulated and prescribed in the 113th chapter of the Revised Statutes. And the power and duty of Justices of the Peace and of the Court of Common Pleas, respectively, in relation to such actions, is to be ascertained and deduced from a consideration of its various provisions. For beasts alleged to have been unlawfully at large, and for that cause distrained or impounded, the owner may maintain a writ of replevin, sued out and prosecuted before a Justice of the Peace, (sec. 17;) and for goods unlawfully taken or detained, the value of which is more than twenty dollars, the owner or other person entitled to possession may have the like writ sued out and returnable before the Court of Common Pleas. (Sections 27, 28.) It is obvious that by such provisions no general power is conferred upon either of these tribunals, but only a limited right to entertain jurisdiction of actions which parties are specially allowed to institute and bring before them. In *Jordan* v. *Dennis*, (7 Met. 590,) it was determined that no action of replevin for any other property than beasts, distrained or impounded could be maintained before a Justice of the Peace, for the reason that the giving of express jurisdiction in cases particularly enumerated necessarily implied that it was neither granted nor to be entertained in any other. In like manner, and for the same reason, as the Court of Common Pleas is authorized by special provision to entertain jurisdiction of

actions of replevin brought to recover possession of goods unlawfully taken or detained, which are of more value than twenty dollars, it is necessarily limited thereto, and can lawfully take cognizance of no other. It is a necessary consequence, from these premises, that no action of replevin, except for beasts distrained or impounded, or for goods of greater value than twenty dollars, can be maintained either before a Justice of the Peace or in the Court of Common Pleas. And as no provision is made for the prosecution of such actions before any other tribunal, it follows that, for property of less value than twenty dollars, no action of replevin can be maintained.

Formerly it was otherwise. By the colonial ordinance of 1641, it was declared that "every man shall have liberty to replevy his cattle or goods" without any restraint or exception in relation to the value of the property sought to be recovered. While that ordinance remained in force there was no limit assigned to the right of resorting to this particular remedy. And it did so continue until the whole subject was revised by the Legislature. By the statute of 1789, chapter 26, of which that part of the 113th chapter of the Revised Statutes relating to actions of replevin is substantially a copy, the causes for which, and the tribunals where, such actions might be prosecuted, were specially designated and prescribed. The effect of these new provisions was to supersede and repeal all former laws in relation thereto. (Comm'rs Report, ch. 113; *Commonwealth* v. *Cooley*, 10 Pick. 37). Instead of the general liberty which had been previously allowed, and which extended to property of the minutest value, authority was thereby given only to prosecute actions of replevin for cattle distrained or impounded, and for goods, the value of which exceeded four pounds, for which sum twenty dollars was subsequently substituted. No provision was thereby made for the restitution to the owner of his specific goods if they were of less value than twenty dollars; and that omission, very plainly intentional, has never since been supplied. Undoubtedly it was considered by the Legislature, that for the unlawful detention of property of such inconsiderable value the action of replevin was an inappropriate and unsuitable remedy, and that the owner would find in other modes of proceeding adequate redress for the injury sustained.

A different conclusion cannot be deduced from the pro-

visions of the 2d section of the 82d chapter of the Revised Statutes. The sole object of that section, — as it was of the similar provision in the statute of 1820, (c. 76,) by which the Court of Common Pleas, as it now exists, was originally established, — is to define the jurisdiction of that court over actions elsewhere enumerated, or otherwise than by its own provisions permitted or allowed by law. It was not designed, nor does it in the least purport to authorize any other or different action of replevin than those enumerated in the 113th chapter of the Revised Statutes, or to make them available for the recovery of any other property than that therein described; and therefore it does not confer upon the court any enlarged jurisdiction concerning them.

W. C. Bates, for the plaintiff.

H. Vose, for the defendant.

Supreme Judicial Court, Suffolk, ss., Nov. Term, 1853.

DAVID PINGREE v. GEORGE W. COFFIN.

Evidence in Equity — Statute 1852, *c.* 312, § 85.

The statute 1852, c. 312, § 85, providing that "In all proceedings in equity, the evidence shall be taken in the same manner as in suits at law, unless the court for special reasons shall otherwise direct," supersedes the rules of court as to the taking and filing of depositions in chancery.

IN this case, which was a suit in equity, the complainant, after the expiration of four months from the day when the replication was filed, applied for a commission to take the testimony of a witness residing out of the Commonwealth. The respondent objected to the issuing of the commission, on the ground, that by the 27th rule in chancery of this court, (24 Pick. 416,) the cause must be considered as set down for hearing, and no further testimony could be taken.

S. Bartlett, for the complainant, now contended that the rules of this court as to the time and manner of taking depositions in chancery were superseded and repealed by statute 1852, c. 312, § 85, providing that "In all proceedings in equity, the evidence shall be taken in the same manner as in suits at law, unless the court for special reasons shall otherwise direct."

C. B. Goodrich, for the respondent.

SHAW, C. J. — There is no reason why the statute of

1852 should not have the same effect, practically, which it has literally. The words are, "The evidence shall be taken in the same manner" in equity as in law. That is to say, it is to be taken *vivâ voce*, when it can be so taken; and when depositions would be allowed in an action at law, they may be taken in equity, and all the rules of law as to the taking and filing of depositions at law will apply in equity; and this statute necessarily supersedes the rules of court as to the taking and filing of depositions in chancery. The complainant is therefore entitled to have a commission issue.

James Feeley's Case.

Habeas Corpus — Assault and Battery — Sentence.

Under statute 1853, c. 196, § 1, giving concurrent jurisdiction to Police Court, the Court of Common Pleas, and Municipal Court, of all cases of assault and battery of a certain description, and providing for punishment by fine or imprisonment, the Municipal Court cannot upon appeal from the Police Court, although it may have a larger original jurisdiction, inflict any higher or larger punishment than that court could have imposed, and cannot therefore sentence the offender to fine *and* imprisonment. And where such sentence has been imposed and the fine paid, the court in the exercise of its discretionary powers may discharge the prisoner on *habeas corpus*, although for an error in the judgment of the court below, a writ of error is the ordinary remedy.

This was a petition for a writ of *habeas corpus*. The petitioner represented that on the 27th of September last, (1853,) he was brought before the Police Court of Boston, by virtue of a warrant in due form of law, issued by said court upon a complaint under oath, setting forth an assault and battery by him on Ellen McCloud; and that the said assault and battery were not committed with intent to commit any other offence, nor with a weapon dangerous to life, and that the life of said Ellen was not endangered thereby, and that she was not thereby maimed. He further represented, that on said complaint he was found guilty and sentenced to pay a fine of twenty-five dollars and costs of prosecution, and stand committed until sentence be complied with, or he be discharged in due course of law; from which sentence he appealed to the Municipal Court of the city of Boston, and recognised to prosecute his appeal; that said appeal was duly entered at the October term of the Municipal Court, and that the petitioner was there tried and found guilty by the jury and was

sentenced to pay a fine of twenty-five dollars and costs of prosecution, and if the same should not be paid within two days, then to be imprisoned in the common jail for this county six months, and if the fine should be paid within two days, then to be imprisoned in said jail three months, and stand committed accordingly; that he paid said fine and costs within two days as specified in that sentence, and that he was now imprisoned in said jail and restrained of his liberty by the keeper of said jail by virtue of the sentence of the Municipal Court. A copy of the record of the Municipal Court in this case was annexed to the petition, as well as a certificate of the clerk of the jail that the fine and costs had been paid.

Shaw, C. J. — The petitioner contends that the Police Court in this case under statute 1853, c. 196, § 1, could not punish by fine *and* imprisonment, but only by fine *or* imprisonment, and that the Municipal Court had no authority to impose any higher or larger punishment than the Police Court could have imposed. And in this respect this court is clearly of opinion that the sentence of the Municipal Court was erroneous. It is the very nature and character of appellate jurisdiction to revise the doings of another court, and to do that which the court below might have done and ought to have done. The Municipal Court, therefore, although they might have a larger original jurisdiction, had no authority as an appellate court to do what the Police Court could not have done, and could not sentence the petitioner to both fine and imprisonment.

The question then arises whether *habeas corpus* is an appropriate remedy. The error here is in the judgment of the Municipal Court, and not in the warrant issued thereon. The ordinary remedy is by writ of error, and there are many strong reasons why the prisoner should not usually be discharged by *habeas corpus* in such a case, and therefore our *habeas corpus* act, (Rev. Stat. c. 111, § 2,) provides that in such a case the party shall not be entitled to the writ as of right. One strong reason why a writ of error should be resorted to, is, that as the law now stands, if the judgment be found erroneous, the court may render such judgment as should have been rendered, (Stat. 1851, c. 87,) and when the error is found in some technical informality not affecting the merits of the case, this power of correcting the judgment is important.

But as the Legislature could not foresee all the instances in which it might be proper to issue this writ so important to the liberty of the subject, they vested a general discretion in the court in all cases. It would not be enough that some time must elapse before a writ of error could be brought, for by Stat. 1842, c. 54, § 2, writs of error may be brought in any county, and are entitled to the same privilege as to the hearing thereof as writs of *habeas corpus*. But here, looking into the whole record, we see that the judgment complained of is erroneous, inasmuch as the court had no power to punish by fine and imprisonment. The fine was imposed by the court below, and again on appeal by the court above, and has been paid. That part of the punishment has been suffered, and the remainder of the punishment is not warranted by law. It is somewhat analogous to the case of a jailer's holding a prisoner beyond the lawful time of his sentence. Here, although the error was in the judgment, still the error consisted in imposing any imprisonment after the fine had been imposed and paid. The only correction of the error would be in reversing and annulling that part of the judgment which imposed any imprisonment; upon such correction, no judgment would remain warranting the imprisonment, and the petitioner would be entitled to his immediate discharge from custody. This court, therefore, we think, in the exercise of the high powers conferred upon it in favor of personal liberty, may with propriety grant the writ of *habeas corpus*, and upon the return thereof discharge the prisoner. Writ granted.

C. L. Hancock, for the petitioner.

G. P. Sanger, for the Commonwealth.

Supreme Judicial Court, Worcester, ss., Oct. T., 1853.

WORCESTER COUNTY INSTITUTION for SAVINGS *v.* CITY of WORCESTER.

Taxes — Savings Banks.

A Savings Bank incoporated under the authority of this Commonwealth is not taxable for bank stock in which its deposits are invested.

THIS was an action of contract by a Savings Bank incorporated under the authority of this Commonwealth to recover a tax assessed upon bank stock in which deposits

made with the plaintiffs had been invested. If the tax was legally assessed, the plaintiffs were to become nonsuit, otherwise the defendants were to be defaulted.

METCALF, J. — The only question in this case is, whether the plaintiffs were legally taxed for the bank stock in which they had invested the money received by them on deposit; and we deem it very clear that they were not. They pay interest on the deposits received by them, (Rev. Stat. c. 36, s. 81,) and the several depositors are taxable as for money at interest. (Rev. Stat. c. 7, s. 4.)

It is true that the plaintiffs receive interest by way of dividends on the deposits which they invest in bank stock; but as they pay interest to the depositors, they are not taxable for the money thus at interest; because by Rev. Stat. c. 7, s. 4, it is only "moneys at interest due to the persons to be taxed more than they pay interest for," that are taxable. This case is not distinguishable from that of banks and manufacturing corporations in which the stockholders and not the corporations are taxable for the stock, with the single exception of machinery employed in manufactures. (Rev. Stat. c. 7, s. 10.)

Defendants defaulted.

J. Mason, for the plaintiffs. *H. Chapin*, for defendants.

In the Supreme Court of Illinois, held at Ottawa, June, 1853. Error to Cook County.

WILLIAM H. STOW v. JOHN YARWOOD, ET AL.

Before TREAT, C. J., CATON AND SCATES, JJ.

Recoupment — Adjustment of mutual demands in actions ex delicto.

When S. employed Y. to repair a steam engine, and after the repairs were made, and the engine had come into the possession of S., Y. seized it without authority; it was *held*, in an action of trover by S., that Y. might recoup his claim for repairs against the damages for the conversion.

THIS was an action of trover for the conversion by Stow of a boiler and various other parts of a steam engine, which had been left at Stow's foundry in Chicago to be repaired, by Yarwood and the other defendants in error.

On the trial, which took place in May, 1851, at Chicago, it appeared, that Yarwood and the others were, in 1840, the owners of the steam engine referred to, and employed Stow

to repair the same. Repairs were made to the amount of about seven hundred dollars, when Yarwood, without Stow's knowledge, and in his absence, but with the permission of his clerks, removed the engine without paying for the repairs. In order to secure payment of his claim, (the plaintiffs below having then recently become insolvent,) Stow took a strong force of men and teams to the place where the engine was put, took the same and carried it back to Chicago. Yarwood and the other owners thereupon sued out a writ of replevin, under which they recovered possession of the greater part of the engine, still leaving in Stow's possession one boiler, an arch-front and some other articles, parts of the machinery. The declaration in this suit alleged a conversion by Stow of all the parts of the engine which had not been recovered in the action of replevin. The two suits were instituted in the years 1841–1842.

The counsel for the defendant below offered to *recoup* the amount due for the repairs against the plaintiff's damages; and requested the Judge of the Circuit Court to instruct the Jury to that effect. This the court refused to do, and the jury rendered a verdict for the plaintiffs for seven hundred and thirty-five dollars damages and interest. A motion was then entered by the counsel for the defendant for a new trial, for error in not giving the instruction asked for. This motion was overruled, and the cause was carried to the Supreme Court by a bill of exceptions and writ of error, where it was heard upon a written argument filed by Mr. Windett, and upon Mr. Hayne's brief of points and authorities.

For the plaintiff in error, it was contended, that inasmuch as both the claim for damages, and that for the repairs, were out of one and the same subject-matter, it was a proper case for the application of the doctrine of *recoupment;* that whenever in a suit for damages, whether the form of the action is *ex contractu* or *ex delicto*, and whether the damages constituting the ground of action or defence, arise from the breach of an agreement, or grow out of a tort, there are mutual claims, those mutual claims ought, at the election of the party entitled to make the defence, to be adjusted in one suit. It was contended, on behalf of the defendants in error, that the defence overruled by the court below was properly rejected, because damages could not

be set off in an action of trover; and because the doctrine of recoupment is only applicable to defences arising *ex contractu*, and in actions in form *ex contractu*.

Treat, C. J. delivered the opinion of the court. — This was an action of trover; the plea was the general issue. The evidence showed that the defendant converted to his own use certain property belonging to the plaintiffs, upon which he had previously done work at their instance.

If he ever had a lien on account of the work, it was waived before the conversion. The court directed the jury not to take into consideration the claim for work done upon the property; and the propriety of that ruling is the only question in the case. It is clear that the demand is not admissible as a set-off. It arose upon a contract, and the action was founded upon a tort. Unless it was admissible in mitigation of damages, it must be the subject of a separate action. It is insisted that the doctrine of recoupment is applicable to the case. A reference to the authorities will settle the question. "If a man disseise me of land out of which a rent charge is issuant, which has been in arrear for several years, and the disseisor pay it, if the disseisee recover in an assize, the rent that the disseisor has paid shall be recouped in damages." (Dyer, 2, b.) If a man having rent issuant out of land disseises the tenant, in an assize brought by the latter, the disseisor may recoup the rent in damages. So if a disseisor repairs the house or sows the land, the same shall be recouped in damages. (8 Viner's Abr. 556, 557.) If a stranger converts the goods of an intestate, and is sued in trover for the goods by the administrator, he may show, in mitigation of damages, that he applied the proceeds in payment of the debts of the intestate. (2. Term Rep. 97.)

If the goods are pledged to secure the payment of a debt, and the pledgee converts them to his own use, he may recoup the amount of his debt, in an action brought against him for the conversion of the goods. *Jarvis* v. *Rogers*, (15 Mass. Rep. 389.) Story on Bailments, (§§ 315, 349) In trover for goods, the defendant may recoup the amount of a lien thereon, for freight, or for work done. (20 Wend. 267; Burrows 2214;) *The Dresser Man. Co.* v. *Waterston*, (3 Met. 9.) If an officer seizes property without legal authority, and applies the proceeds towards the satisfaction of an execution against the owner, he may recoup the amount thus applied in an action of trover or

trespass for the goods. (14 Pick. 356; 6 Mass. Rep. 20; 3 Dana 489; 20 Conn. Rep. 204.)

The principle plainly deducible from these cases is, that mutual demands arising out of the same subject-matter, and capable of being balanced against each other, may be adjusted in one action. One demand is considered as reduced or liquidated by the other, and the surplus only is regarded as the real cause of the action. The defendant's claim is deducted from that of the plaintiff; and the latter recovers the excess only. The defendant is not allowed to recover any balance. He uses his demand in mitigation of damages only. He may recoup to the extent of the plaintiff's damages; but he cannot, as in the case of a set-off, recover any excess in his favor. In another respect, this kind of defence is unlike that of a set-off; the cross demand must proceed from the same subject-matter as the plaintiff's right of action.

This doctrine of recoupment tends to promote justice and to prevent needless litigation. It avoids circuity of action, and multiplicity of suits. It adjusts by one action adverse claims growing out of the same subject-matter. Such claims can generally be much better settled in one proceeding than in several. It is not necessary that the opposing claims should be of the same character. A claim originating in contract may be set up against one originating in tort. This is abundantly established in the cases cited. These actions were in form *ex delicto*, while the claims allowed in defence were *ex contractu*. It is sufficient that the counter claims arise out of the same subject-matter, and that they are susceptible of adjustment in one action.

In this case each party had a cause of action against the other. The plaintiffs had a right to recover from the defendant the amount of the value of the goods converted; and the defendants had a demand against the plaintiffs for labor performed on the same goods. The two claims arose out of one and the same subject-matter, and they may be properly investigated and adjusted in this action. The jury have only to ascertain the value of the goods converted, and of the work done upon them, and then deduct the amount of the latter from the former, and find a verdict in favor of the plaintiffs for the residue. In this way, the claims of both parties may be fully adjusted, and farther litigation rendered unnecessary. We think the defendant

had a right to recoup the amount of his debt, and that the court erred in instructing the jury differently.

The judgment must be reversed, and the cause remanded.

Hon. B. S. Morris, and *A. W. Windett*, appeared for the plaintiff in error. *Thomas Hayne* and *Patrick Ballingall*, for the defendants in error.

Supreme Judicial Court of Massachusetts, Bristol ss., October Term, 1853.

COMMONWEALTH v. JOHN MURPHY.

After a verdict of guilty on an indictment for murder, judgment will not be arrested because there is no averment in the indictment that the deceased at the time of the murder was in the peace of the Commonwealth, nor because it appears of record that there was, at the time of the trial, another indictment against the defendant for the same offence, pending in the same court.

THE defendant was tried and found guilty, by the jury, of the murder of his wife Ellen Murphy, at Fall River, on the 9th of April 1853.

After verdict, the defendant's counsel moved in arrest of judgment for two causes. First, because there was no averment in the indictment that the deceased, at the time of the alleged murder, was "in the peace of the said Commonwealth." Second, because as appeared of record, there was, at the time of the trial, another indictment against the defendant for the same offence, pending in the same court.

N. Morton for the defendant; *Rufus Choate*, (Attorney General) for the Commonwealth.

BY THE COURT — The second ground for the present motion is disposed of by the case of the *Commonwealth* v. *Drew*, (3 Cush. 279.) It was there decided that the pendency of one indictment is no ground for a plea in abatement to another indictment in the same court for the same cause. *A fortiori*, it is not a ground for arresting judgment.

The first reason assigned for the motion in arrest cannot avail the defendant. It is conceded by his counsel that the omitted averment need not have been proved, if it had been inserted. But he contends that the indictment is fatally defective without the averment. On principle, we have no doubt that the averment, that the party murdered was then and there in the peace of the Commonwealth, would have been surplusage, and that the omission of it is wholly immaterial. There is no more reason for

inserting it than for inserting the averment that the defendant, "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," committed the murder. Yet this averment, though formerly inserted in indictments in this Commonwealth, has, for several years, been omitted. And it is not held, in England, that the averment of the murdered party's being in the peace of God and of the king or queen is necessary. On the contrary, it was decided long since, that the omission of this averment is no ground of exception to an indictment for murder. See *Heyden's Case*, (4 Coke, 41 *b*; 2 Hale, P. C. 186; 2 Hawk. c. 25, § 73; 3 Chit. Crim. Law, 733; Bac. Ab. Indictment, G. 2; 7 Dane Ab. 275.) In 2 Stark. Crim. Pl. 2d ed. 387–389, there is a form of an indictment for murder by poisoning, in which there is no averment that the deceased was in the peace of God and the king.

Motion overruled.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts, Suffolk ss., November Term, 1853.

Action. See *Parties.*

Agency. See *Contract — Corporation — Warranty.* Assumpsit on the following warranty by an alleged agent of a corporation, on a bill of parcels. "The above flour is warranted to keep sweet during passage to California." *Held*, that a selling agent has no authority to give such warranty. — *Upton* v. *Suffolk County Mills.*

Assault with Intent to Murder — Arrest. Indictment for an assault with intent to murder. Defence: that the person assaulted (an officer) was endeavoring to arrest the defendant without authority. *Held*, that any officer may arrest a person by whom he has reasonable cause to believe a felony has been committed; if he has no such cause, no assault can be with the felonious intent to murder, as death from resistance would not be murder. — *Commonwealth* v. *McLaughlin.*

Assumpsit. See *Parties.*

Contract. See *Insolvent Debtors and Parties — Patent.* Assumpsit on an agreement, whereby, in consideration of one dollar received, the defendant engaged "to grant to C. McB. (the plaintiff) a license to manufacture under my patents and improvements, India rubber hose in general, except, &c., and to obtain the assent of the N. Company to said license. It is understood that said McB. shall pay a tariff the same as that paid by the G. Company upon belting. In the event of the right of said hose being disposed of, said McB. is to receive one half the bonus obtained therefor, it being optional with him to retain, if he prefers it instead, a half right to manufacture under said tariff." Defendant sold the right, and this action was to recover half the pro-

ceeds. Subsequently to the agreement he had surrendered his patent on account of defects in the specifications, and received a reissue thereof, which he held at the time of the sale. Defence, that the agreement did not apply to the reissued patent, and that it gave only a right to a license and damages on a refusal to grant it, or that the plaintiff must give notice of his election to take one half the bonus before he could maintain this action. *Held*, that the reissue did not vest a new patent in the defendant, so that the sale was of the patent referred to in the agreement, and that, on the facts, this action might be maintained without proving notice of election to take the proceeds of the sale instead of a "half right."—*McBurney* v. *Goodyear*.

Contract.—Agency. An agreement was drawn up in writing, whereby P., A., B., and J. "a building committee," in consideration that M. would construct a building for a medical college by a time specified, and furnish materials therefor, agreed to pay him certain amounts according to the monthly estimates of a certain architect. Before the agreement was signed, P., being about to go away, told the architect that he wished him to get the members of the committee to sign it, saying that he had by a writing authorized A. to sign his (P.'s) name. The other members of the committee signed the agreement accordingly in duplicate in presence of the architect; and A. at the same time signed P.'s name, saying that he was authorized by P. to do so, and producing a paper authorizing him to sign the agreement, but without adding any thing to show that P.'s name was not affixed by P.'s own hand. P. on his return, was told by the architect what he had done about getting the contract signed, took one part into his possession, said all was right, carried it away, and afterwards continued to use his active efforts to ensure the completion of the building. After M. had commenced an action against P., A., B., and J., to recover for work done and materials furnished under this agreement, all the parties executed a second agreement under seal, reciting that they had made the first, and that a third person had agreed to advance a certain sum of money, to be secured by mortgage on the building, for the purpose of insuring the completion thereof, and by this new agreement M. was to do certain additional work on the building, and to have it finished by a certain time; and the parties agreed that the sum so advanced should be applied first to the payment of work thereafter done by M. on the building, and the remainder, if any, to pay for work and materials already furnished; and it was further agreed that nothing contained in this agreement should release or discharge the defendants from any debt already incurred under the original agreement, and that this agreement should in no respect be a waiver of the first, or of any part thereof, but additional thereto. *Held*, that P.'s conduct subsequent to the affixing of his name by A. to the first agreement, was a ratification, or adoption, of A.'s act, and also rendered him liable as a party to the agreement, on the ground of an estoppel *in pais*. *Held*, also, that the action could be maintained without showing a previous notice to the defendants of the exact sums due according to the monthly estimates, or a demand that they should pay the same. *Held*, further, that the second agreement did not postpone or suspend the right of action on the first until the completion of the building, and that it was not necessary in order to enable M. to recover in this action, to show that the whole of the sum advanced would be required to pay for the work done subsequently to the second agreement.—*Merrifield* v. *Parritt et al.*

Contribution. See *Parties*.

Corporation. See *Agency—Parties*.

Covenant. See *Parties*.

Evidence—Statute of Frauds. Assumpsit for money had and received to the use of plaintiff's intestate. Said intestate conveyed a vessel to

defendant by an absolute bill of sale, the consideration named being $4500, the payment of which sum by the defendant was not denied. Evidence was offered to show, that prior to said bill of sale a parol agreement had been made by defendant to pay to plaintiff's intestate on sale of the vessel at the end of six months, so much as he should receive above $4500 and ten per cent. commission, or to reconvey on payment of $4500 and said commission. It was also shown that defendant had sold half said vessel for $3000, had received as earnings some $800, and had insured half the vessel for whom it might concern, and on a loss had received $4100. *Held*, that the evidence was admissible to prove an agreement with regard to the mode of payment not fulfilled, and to sustain an action for the price of the vessel, and so admitted, was not contrary to the statute of frauds.— *Clark* v. *Deshon*.

Indictment — Letting for a House of Ill-Fame. Indictment for letting a tenement to be used for a house of ill-fame, alleging that the defendant on the 15th of April, 1853, and for five months preceding, was the owner and had the control, &c. of a tenement, and on said day and during said months permitted it to be used and occupied for a house of ill-fame, and then and there let it for that purpose. *Held*, that there must be a specific allegation of the time when the house was so let, in which this indictment was deficient, that it was also defective in not alleging that the house was let to a person specified or to the jurors unknown. — *Commonwealth* v. *Moore*.

Indictment — Variance — Larceny. Indictment for larceny on the 24th day of July. The evidence proved a larceny in the night-time. *Held*, under Rev. Stat. c. 126, § 14; Stat. 1843, c. 1, and Stat. 1845, c. 28, that there are two distinct offences, larceny in a dwelling-house &c., in the night-time and in the day-time, and that an allegation of larceny on a certain day is of a larceny in the day-time, so that the evidence above stated was a variance. — *Commonwealth* v. *McLaughlin*.

Indictment — Misjoinder — Verdict. Indictment for a felonious assault with a pistol with intent to rob, with a count for an assault with a pistol not alleging such intent. Verdict not guilty on the first count, and guilty on the second. Motion in arrest for misjoinder of felony and misdemeanor and on the ground that an acquittal on the first count, as it included the offence charged in the second, was an acquittal on the second, and the verdict of guilty on that count void. *Held*, that where two such counts for the same offence are introduced to meet the evidence, it is no ground for arrest, that there might be a discontinuance as to one if it were so, and that the verdict was good. — *Commonwealth* v. *McLaughlin*.

Insolvent Debtors. Bill in equity under Stat. 1838, c. 163, § 18, to set aside a compromise made by the plaintiff's assignee in insolvency under the commissioner's direction, with certain of his debtors, and to reduce the allowance to him for his services, as excessive. *Held*, that this court would not interfere under § 18, to revise a compromise so made, and that as the bill did not allege that by reducing the allowance there would be a balance over and above the debts, or a dividend of more than fifty per cent (in which case the debtor is allowed a per centage) it did not appear that he was interested, and that he could not therefore maintain the bill for that purpose. — *Richards* v. *Merriam*.

Insolvent Debtors — Contract. Assumpsit on an agreement by insolvent debtors to pay enough to make up their dividend to a certain per cent. on the plaintiff's claim, in consideration that the plaintiff would not trouble or oppose their obtaining a discharge, and would say a good word to other creditors to induce them not to oppose. No such agreement was made with or known to any of the creditors except two, who did not constitute with the plaintiffs a majority in number or value of the creditors. No objection to the discharge was known to the plaintiffs. And it was obtained.

Held, that the above agreement was void as against the policy of the insolvent laws. — *Dexter et al.* v. *Snow et al.*

Insolvent Debtors, Preference by. D. F., in January, 185 , knew that he was insolvent and unable to pay his debts in full, but believed that he had enough to pay his creditors fifty per cent. on their claims, and no more. He sold out his stand and stock in trade at a fair price, for ready money, with a view of distributing it ratably among his creditors in that proportion, paid fifty per cent. to several and took discharges. Others refused to accept it, and F., in August, 1850, applied for the benefit of the insolvent laws, having paid to creditors as aforesaid, and expended in the support of family and other purposes all his money and estate, including that received from the above sales, so that he brought no property into insolvency, and paid no dividend. And the commissioner refused his discharge. *Held*, on appeal, that the decree was right; that under Stat. 1841, c. 178, § 8, providing that no discharge should be granted or valid if the debtor thereafter should, within one year before the petition, pay or secure any debt or liability, if he had then reasonable cause to believe himself insolvent, it was immaterial whether the acts prohibited, were done with an honest or fraudulent intent.—*In re Fernald.*

Insurance, Fire. Contract on a policy of insurance to J. F. E., payable in case of loss to W. H. S. Defendant's by-laws, which were made part of the policy, provided that if the insured should alter or enlarge the building, or appropriate the same to any other purposes than those mentioned in the policy, without the consent of the president first obtained, or whenever the risk was increased by the act of the assured, unless the assured should have previously notified the president of such act, and obtained his consent, the policy should be void. The premises were leased by J. F. E , with extensive powers of alteration, repairing, rebuilding, and the right of W. H. S. to the policy, and the lease came by assignment to the plaintiff, and the company assented to such transfer of S 's right under the policy. The plaintiff underlet the premises to M , C. & Co., by a lease prohibiting alterations, underletting, &c., with the ordinary covenant to restore in like good order, &c., and a reservation of a right to re-enter on breach of the covenants. M., C. & Co. altered the premises in a manner which it was contended would avoid the policy. *Held*, that, under the by-laws J. F. E. was "the assured," and that, whatever the nature of the alterations made by M., C. & Co. holding under said last mentioned lease, without the knowledge or consent of the assured or their own lessor, they would not avoid the policy. — *Sanford* v. *Mech. Mut. Fire Ins. Co.*

Insurance, Marine. A policy of insurance on a cargo of ice, at and from Boston to Calcutta, contained the usual printed memorandum clause, that the company would not be liable for any partial loss on goods perishable in their own nature, unless it happened by stranding; and also a written clause that "the company is not liable for ice melting in consequence of putting into port." The vessel, while prosecuting said voyage, sprung a leak by perils of the sea, and was obliged to put into the port of Bahia in Brazil. A survey being immediately called, it was found that it would be necessary to unpack the ice in order to repair the vessel, that the ice was already much melted by the leaking in of the salt water, and that the whole would be melted before the vessel could be so far repaired that it could be re-shipped; and it was accordingly taken out and sold. *Held*, that, as the ice would have been totally destroyed before it could have reached the port of destination, there was a total loss of the ice within the meaning of the memorandum clause; and that, as the melting of the ice was not "in consequence of putting into port," merely, but was occasioned by an injury to the vessel by perils of the sea, and the consequent necessity of putting into port and taking out the ice in order to repair

the vessel, the written clause did not so far control the other provisions of the policy as to exempt the insurers from liability as for a total loss — *Tudor* v. *New England Mut. Ins. Co.*

Insurance, Marine — Implied Warranty of Seaworthiness. This was an action on a time policy for one year on the ship Riga, and the defence was: *First*, that at the commencement of the risk, regarding decay only, she was so much weakened and impaired in strength, as not to be able to bear the ordinary perils of navigation without essential repairs, and replacing when in need the timbers decayed or beginning to decay, for and during the time of one year, for which she was insured; and if so, she was not seaworthy within the implied warranty, by which the assured were bound, and so the policy never attached. *Second*, that if it did attach, the assured were under a like obligation or warranty to have her sound and in good repair and seaworthy at the commencement of each voyage or passage during the year, and if they failed to perform this duty, the insurers were discharged, and the policy thereby avoided; so that if a loss afterwards occurred, by a peril insured against, and not caused wholly or partly by such unseaworthiness from weakness or decay, the insurers were discharged, and that such failure did occur by the Riga's sailing from Norfolk to Sicily in an unseaworthy condition, and afterwards from Savannah to New York in a like condition. On the last voyage she was burnt at sea. *Held*, that on a policy on time for a certain term at all times and places, there is no implied warranty on the part of the assured that the vessel is seaworthy in the ordinary sense of that term, either at the time of the policy underwritten, or at the day on which the policy by its terms commences the risk; but that the only implied warranty in this respect is, that the vessel is in existence as a vessel, not lost at the time fixed for the commencement of the risk; capable, if then in port, of being made useful, with proper repairs and fittings, for navigation, and is in a safe or suitable condition for such a vessel to be in, whether at sea, in port, stripped and under repairs, on a suitable railway for that purpose or otherwise, and is seaworthy when she first sails from port, or if she is at sea, that she has sailed in a seaworthy condition, and is safe (*salvus* — not lost) so as to be a proper subject for a contract of insurance at the time the risk attaches; and if the vessel is in such condition, and the implied warranty to this extent is not broken, the policy attaches, and is not void, and the premium cannot be recovered back; but if the vessel was then lost, become a wreck, or had ceased to exist as a vessel, or was, if at sea, in a condition or under circumstances in which she could not on her arrival in port be made available by reasonable or suitable repairs and fitting for navigation, then there was no subject for the policy to take effect upon, the contract would fail and be void, and the premium liable to be recovered back, thus negativing the first proposition on which the defence was placed, to wit: that in every policy of insurance on time, there is an implied warranty on the part of the assured that the vessel is then in such a state of strength, soundness, and freedom from decay, that she must be considered reasonably capable, without replacing decayed timbers or materials, to bear the ordinary perils of navigation, during the term of time covered by the policy. *Held*, further, that if the vessel was seaworthy at the inception of the risk, the policy attached, and that although it was the duty of the assured, relying on the policy for indemnity, to keep the vessel sound, stanch and suitably fitted to bear the ordinary perils of navigation, yet the obligation to do so, was not a warranty of seaworthiness, in the ordinary sense of that term, so that a failure to perform it, would determine and put an end to the contract, and discharge the underwriters from their liability for any or all perils; but the obligation of the assured was to this effect, that if they failed to perform it, and the vessel should become unseaworthy during the term, and the vessel

should be afterwards lost, from a cause attributable in whole or in part, to such default on the part of the assured, the underwriters would not be responsible for such loss, because not a risk insured against. But as the policy is not rendered void by such unseaworthiness, if the vessel be subsequently lost, by a peril insured against, not caused in whole or in part by such default of the assured, they would be entitled to recover; that the sailing of a vessel from Norfolk on a voyage to Sicily, and afterwards from Savannah to New York, although in an unseaworthy condition, was not a breach of warranty, which annulled and rendered the policy void, if the loss was not attributable to such unseaworthiness, and if the vessel, within the term was lost by fire, which was an independent peril insured against, the underwriters were liable for the loss. — *Capen* v. *Washington Ins. Co.*

Larceny. See *Indictment.*

Misjoinder. See *Indictment.*

Parties — Contract — Assumpsit. Assumpsit for commissions on a charter party. Defendant applied to plaintiff, a ship broker, in Boston, to procure a charter. Plaintiff applied to ship brokers in New York, who obtained one. By usage among ship brokers, in such case, the second broker is entitled to one half the commissions obtained, the first broker receiving the whole and paying over to the other. The charter party, which was sealed, and to which the plaintiff was not a party, contained this clause: "Commissions on procuring said freight (5 per cent.) to be paid by the owners of the ship to B. Bruce (the plaintiff) in Boston." Plaintiff wrote to defendant, "You will much oblige me by paying this bill, as part of the commissions are claimed by a house in New York," &c. *Held*, that the clause quoted from the charter party was merely an admission, and evidence as such, but did not render it necessary for the plaintiff to sue on the sealed agreement; and that he must sue in assumpsit. *Held*, also, that he was solely interested in the contract, and the brokers in New York need not join in an action thereon. — *Bruce* v. *Parsons.*

Parties — Corporation — Trust — Contribution. Bill in equity by plaintiff as a stockholder of the B. M. S., to obtain contribution for debts paid by him as stockholder, and to enforce a trust alleged to have been created by a transfer of the property of the company to certain other stockholders to settle its affairs, and charging F. one of the defendants, not a stockholder, with having been instrumental in violating the trust. F. demurred for want of jurisdiction and equity. *Held*, that, F., not being a stockholder, the bill would not lie against him for contribution, and that as to the trust, it being alleged to be for the benefit of all the stockholders and creditors of the company, the bill should be in the name or behalf of all, while this was in plaintiff's name alone — and the demurrer was sustained. — *Heath* v. *Ellis et al.*

Parties — Covenant — Partnership — Action. Covenant broken on articles of partnership under seal between B., C., and D., by C. against B. for not devoting all his time, as agreed, to the business. There was an award, but it was provided that all debts due to or from the firm should be paid to and by each in proportion to their interests. *Held*, that the articles must be considered as made by each with the other two, or with the other two and each of them jointly and severally, and in either case the legal interest was joint, and an action against one for a breach must be in the name of the other two. Also, that no action would lie at law, but that the remedy was in equity. And *Dunham* v. *Gillis*, 8 Mass., 462, was overruled. — *Capen* v. *Barrows.*

Sale — Replevin — Pleading. Replevin for 150 barrels pork. The general issue was pleaded, and the following facts agreed, viz.; February 10, 1850, S T. & Co. purchased of defendants 250 barrels pork, branded "W. and H.," and paid by notes on six months still in defendant's

hands. The pork was, at the sale, and until service of the writ remained, in defendant's cellar, mixed with other pork of defendant's, part of the same brand and quality, part of different brands, and was never separated until the sheriff separated and took 150 barrels on the writ of replevin; and it remained in defendant's cellar by agreement, S. T. & Co. paying storage. May 13, 1850, S. T. & Co. sold 100 barrels to L., and defendants delivered it on their order. May 27, 1850, they sold the balance (150 barrels) to S., the plaintiff, who paid for it, receiving an order on defendants, and agreed with them that the pork should remain in their cellar, at his risk, and at the same rate of storage paid by S. T. & Co. June 25, 1850, S. T. & Co. became insolvent. On that day the plaintiff demanded the 150 barrels of the defendants, who refused to deliver it. The next day he again demanded it, tendering the storage, and the defendants again refusing to deliver, the sheriff took upon the replevin writ in this case 150 barrels of the brand specified. *Held*, it being objected that on the pleading, the defendant could not deny property in the plaintiff, that no such objection could now be taken, all defects in pleading being waived by an agreed statement, unless expressly reserved, and, further, that there was no defect; that the general issue by statute was the only and proper plea, and the plaintiff, having called for no specification of defence, could not object that none was filed; and *held*, also, that where there is a bargain and sale of goods, being part of a larger bulk or number, no property in such goods passes to the vendee until separation or identification of some specific goods. That the law knows no floating right of property which may attach to one or another parcel of goods according to circumstances, and that as no such separation or identification had taken place here, although the sale was complete in every other respect, the property did not pass, and replevin could not be maintained for the pork. *Held*, also, that there was no wrongful intermixture of goods, such intermixture implying a previous separation, nor any estoppel on the defendants by their agreement that one hundred and fifty barrels were the plaintiff's property, and that they would hold them for hire or storage, as they did not agree that any particular one hundred and fifty barrels were his property. — *Scudder* v. *Worster, et al.*

Statute of Frauds. See *Evidence.*

Trust. See *Party.*

Variance. See *Indictment.*

Verdict. See *Indictment.*

Warranty. See *Agency.*

Way. Petition under Revised Statutes c. 25, § 6, for a jury to assess damages in consequence of grading and altering the level of Fourth street, in South Boston. Statute 1803. ch. 11, provided that the Selectmen of Boston might lay out streets in South Boston, and should not be obliged to complete them sooner than they deemed expedient, or pay damages for any laid out within twelve months. This street was so laid out, and it was claimed by the respondents that the grading for which damages were sought was the completion of said street under said act. April 25, 1831, certain persons petitioned the Mayor and Aldermen "that the main road, as laid out from the village to the Point, (which takes in the old road most of the way) may be made." Thereon the committee to whom this was referred reported "that the public convenience required that the order of the Selectmen, passed February 27, 1804, accepting and laying out Fourth street, be carried into execution, so far as the same now remains unfinished," and this report was accepted. *Held*, that this was a completion of the street under the act of 1803, ch. 11, and that the petitioner was entitled to damages for the present alteration. — *Fernald* v. *City of Boston.*

Way. Action against a town for a defect in the highway. The declaration alleged that the female plaintiff was thrown from her carriage by reason of an alleged defect, and thereby injured. On the evidence it did not clearly appear whether she was thrown or jumped out. The case went to the jury on general instructions as to the liability of towns, and afterwards the jury came in to ask whether the plaintiffs could recover if she jumped out, and the court instructed them that the rule of law was, as in the case of passenger carriers, that, if she leaped out in the apprehension of impending danger from the defect, to avoid it, and such leaping was under the actual circumstances reasonable and proper in the exercise of ordinary care and discretion, the plaintiffs might recover, although it might now appear that had she not leaped she would have remained in the carriage, but that it was otherwise if it was a rash and imprudent act. *Held*, that these instructions were correct, and applicable to towns as well as passenger carriers, but that there was a variance between the declaration and evidence, and that as the defendants had no opportunity to take advantage of this, the question as to voluntary leaping having been raised, after the case had gone to the jury, by their question, they were not estopped to take the objection at this time, and on this ground a new trial was granted. — *Lund* v. *Tyngsboro'*.

Miscellaneous Intelligence.

The Wilkesbarre Slave Case. The proceedings before Judge Grier, of the third Federal Circuit Court, in the hearing in the matter of a habeas corpus issued from the Federal Court, to relieve the United States officers from arrest under State process, for riot and assault and battery with intent to kill, while endeavoring to apprehend one Bill Thomas, an alleged fugitive slave, having excited considerable comment, we give below a report thereof, from the National Intelligencer: —

On the 4th of October, just after the adjournment of the court, a warrant of arrest was served upon John Jenkins and James Crossin, United States Deputy Marshals, charging them with a riot, and an assault and battery on Bill Thomas, an alleged fugitive slave, with an attempt to kill him. The warrant was issued by a magistrate of Wilkesbarre, on the oath of one William C. Gildersleve, of that borough, and by virtue thereof the deputy marshals were arrested and held in custody by the high constable of Wilkesbarre. The warrant had also the name of George Wynkoop, upon whom it had not been served, Mr. Wynkoop being absent from the city. A habeas was thereupon sued out of the United States Court, and served upon the high constable.

At the hearing on the habeas, Mr. Jackson, for the high constable of Wilkesbarre, read his answer to the court, in which he admitted that he held the deputy marshals in custody, but alleged that he did so by legal authority, having arrested them on a warrant issued by Gilbert Burrows, a magistrate of Wilkesbarre, on the action of Wm. C. Gildersleve, a citizen of Wilkesbarre.

Judge Grier. —Who is Wm. C. Gildersleve?

Marshal Wynkoop.—Your honor, he is an abolitionist of Wilkesbarre.

Mr. Jackson. — He is a respectable storekeeper of that borough.

Judge GRIER. Was the assault and battery committed on him?

District Attorney ASHMEAD. No, sir; he does not allege it.

Judge GRIER. Oh! Oh!

District Attorney ASHMEAD said he would now read the petition for the habeas corpus. The petition sets forth all the facts of the case from the moment the claim was laid before United States Commissioner INGRAHAM up to the present arrest of the fugitive and the service of the warrant on the present occasion.

Mr. ASHMEAD read, from the 4th volume of the Statutes at Large, act of March 5th, 1833, which gives to a United States Judge the power to discharge on habeas corpus, when one of the United States officers is arrested. He therefore asked that the defendants be discharged.

Mr. JACKSON replied. He said that the law did not authorize the officers to execute their process in a riotous manner, as in this case.

Judge GRIER. I shall take the facts set forth in the petition to be true, unless the other side wish to offer testimony.

Mr. JACKSON then went on to argue that the act of Congress had no reference to acts committed against the laws of a State; nor could the United States interfere to prevent the execution of the laws of a State. He asked that the defendants be remanded to take their trial, or be required to give bail.

D. P. BROWN followed on the same side. He said that the question was a very simple one, and he felt pleasure in approaching it. The duties of the United States and the individual States were reciprocal, and a reciprocal confidence should be exhibited. There was little or no conflict in the case which could not be easily reconciled.

Judge GRIER. I take it for granted that the facts set forth in the petition are true, and I shall rely upon them unless they are shown to be false.

Mr. BROWN. We rely upon the warrant of the magistrate, issued upon the oath of a citizen.

Judge GRIER. If you deny what is set forth in the petition, I will hear the facts in the case. I will not have the officers of the United States harassed at every step in the performance of their duties by every petty magistrate who chooses to harass them, or by any unprincipled interloper who chooses to make complaints against them; for I know something of the man who makes this complaint. The laws of the United States are binding upon me, and I will not take the warrant issued in this case as sufficient to hold these officers.

Mr. BROWN. Your Honor will perceive that if murder had been committed we would not prosecute in a United States' court for it.

Judge GRIER. There has been no murder committed here. The officers were acting under a process of the United States, legally issued.

District Attorney ASHMEAD said the case was free from difficulty. He called upon the court to vindicate the laws of the United States and its own officers, who were constantly subjected to the most harassing conduct on the part of men disposed to set the laws of the Union at defiance.

Judge GRIER. I shall act as if I had the evidence before me, unless the other side are prepared to deny the facts set forth in the petition. In that case I shall put the matter off, to give them a chance to submit their testimony. The officers, I suppose, arrested the fugitive, and he resisted; they then used force to hold him in custody.

Mr. BROWN. We deny this. We say that he did not resist, and that he was cruelly beaten. We shall show such a case of barbarity as will appal your Honor.

District Attorney ASHMEAD. They allege that the officers executed

their duties in a riotous manner. They went to the borough, of course, to serve the process which was put into their hands by a United States' Commissioner, upon the oath of a competent party, countersigned by a Judge of the United States' Court. They executed the process, and were resisted by their prisoner even to the drawing of a knife upon them, which was put into his hands by one of the bystanders. They were compelled to use sufficient force to secure him, and this the opposite party call rioting. It is not Bill who sues here. They well know that he has fled beyond the jurisdiction of this court. To hold the officers to answer, there must be some excess of authority shown in what they did, and the proof is upon them. Every officer is *primâ facie* supposed to act in a legal manner. Is every magistrate in the State, numbering probably two thousand, to have power to issue his warrant of arrest against the officers of the United States upon the intervention of any interloper who has the hardihood to swear that the officers exceeded their authority? If this is to be the case, the Marshal himself may be arrested under their warrant for an alleged improper exercise of his duties, or even the Judges of this Court or United States District Attorney may be subjected to the same annoyance.

Mr. Brown. Your Honor, there was no resistance at all. We put our case upon the excess of authority on the part of the officers. If your Honor is determined to go behind the warrant of the magistrate, we ask to be permitted to show the facts in the case, which will be found to be of the most horrible character.

District Attorney Ashmead asked that the officers be discharged from custody.

Judge Grier. If this man Gildersleve fails to make out the facts set forth in the warrant of arrest, I will request the Prosecuting Attorney of Luzerne county to prosecute him for perjury. I know that the United States have a limited authority; but where they have it, it is clear, undoubted, and conclusive that theirs is the sovereign authority. If any two-penny magistrate or any unprincipled interloper can come in and cause to be arrested the officers of the United States whenever they please, it is a sad state of affairs. After the man against whom the United States' warrant was issued has run away, some fellow intervenes and runs to a State Judge for his interference, and has the United States officers arrested. There was a case recently of this kind, and to that I now allude. If habeas corpuses, are to be taken out after that manner, I will have an indictment sent to the United States' Grand Jury against the person who applies for the writ, or assists in getting it, the lawyer who defends it, and the sheriff who serves the writ, to see whether the United States' officers are to be arrested and harassed whenever they attempt to serve a process of the United States. I speak of what is daily done to thwart the United States in the exercise of their lawful authority. I will see that my officers are protected. When will you be ready with your proofs in this matter, Mr. Brown?

Mr. Brown. This day one week.

Judge Grier. Then upon that day I will hear your proof.

On the 15th October, in the Circuit Court at Philadelphia, Judge Grier delivered his opinion in substance as follows: —

The prisoners, John Jenkins and James Crossin, have been brought before the court by virtue of a writ of habeas corpus issued and allowed by me on the 4th of October, and directed to J. B. Chollet. The petition for this writ sets forth that the petitioners are deputies of the marshal of the United States for this district; that a warrant was placed in their hands by said marshal, issued by E. D. Ingraham, Esq., Commissioner,

and indorsed by a Judge of the Supreme Court, directing them to arrest a negro named William Thomas, who being held to labor and service in the State of Virginia, and owing the same to a certain Isham Keith, of Farquhar county, Virginia, had escaped therefrom into the State of Pensylvania; that they proceeded to Wilksebarre, Luzerne county, Pa., where the fugitive was found; that they attempted to arrest him in obedience to said warrant; that the arrest was resisted with great violence, and, after a severe struggle the fugitive succeeded in escaping. They complain that they have been arrested and imprisoned under color of a warrant from a justice of the peace of Luzerne county, charging them with an assault and battery on said fugitive, with intent to kill, and pray to be discharged from said imprisonment.

To this writ of habeas corpus, Chollet makes return — that he detains the prisoners by virtue of a certain warrant issued by Gilbert Burrows, a justice of the peace for the borough of Wilkesbarre, and indorsed by an alderman of Philadelphia.

The warrant sets forth an information upon the oath of a certain Wm. C. Gildersleve, "That Geo. Wynkoop, John Jenkins and James Crossin, in a riotous manner, with pistols and other weapons, beat and wounded a certain colored man named Bill, and that they assaulted, beat and abused the said Bill, as the deponent believed, with intent to kill him."

A warrant of arrest issued by a justice of the peace has none of the characteristics of a judgment of a court of record, and is therefore not conclusive evidence that the prisoner is rightly deprived of his liberty. It is every day's practice to inquire into its regularity, and whether it has been issued on sufficient grounds to justify the arrest and imprisonment.

The authority conferred on the Judges of the United States by act of Congress, gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned "by any authority," for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed.

Not believing that the courts of the United States have been left in this helpless condition, or that we are required and authorized to issue a habeas corpus, without any power to release the prisoners if unjustly detained, the objection to the jurisdiction and power of the court was overruled, and the further hearing of the case postponed till the 12th of October, in order that proof might be made of the facts stated in the petition, and that the State of Pennsylvania, through her known officers, might appear, if she saw fit, and show any just cause of complaint against the officers now in arrest.

In conclusion, as we find that the prisoners are officers of the United States "in confinement for acts done in pursuance of a law of the United States, and under process from a Judge of the same; that they have not exceeded the exigency of the proofs under which they acted; that this prosecution has not been instituted and is not now acknowledged by the State of Pennsylvania, but has its origin in some association living at a distance, and wholly ignorant of the whole transaction which it has volunteered to investigate; that the information on which the warrant to arrest the prisoner is founded, was sworn to by one who did not know whether the matter of the affidavit presented to him was true or false; and that, by a statement of but half the truth, it is wholly false; the prisoners are therefore discharged.

The Vermont Senatorial Vacancy. — The Legislature of Vermont at its recent session, failed, after many ballotings, to elect a Senator to Congress, for the residue of the term for which the Hon. Mr. Upham was

elected. This gentleman died in January last; and, the legislature not being then in session, the vacancy was filled by the temporary appointment, by the Governor, of Judge Phelps.

From this state of facts, two questions arise: 1st. Is there, at present existing, a vacancy which can constitutionally be filled by the Executive of Vermont? 2d. Is Judge Phelps bound, or entitled, by virtue of his appointment, last winter, to take his seat and perform the duties of Senator? It is said, we know not with how much truth, that he is about to claim the seat, and that another person, with a commission from the present Governor, will contest it.

The only provision in the Constitution relative to this matter, is in the third section of the first article, and is as follows:

"If vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

A vacancy authorizing the Governor to appoint, must "happen during the recess of the legislature." In this case, such a vacancy did *happen* in January last, but that vacancy has already been filled, and the power of the Executive in relation thereto exhausted. If it should be said that the seat is now vacant, when did this vacancy happen? It could not have happened during the recess of the legislature; for the temporary term of Judge Phelps, during which he filled it for a time, did not expire, if it has yet expired, until the last point of time, before the recent meeting of the legislature. It will hardly do to say that any vacancy which exists may be considered as having *happened* at any point of time while it has existed; though such a construction, we believe, has been broached. It might be allowed where necessary to save a nation, but not to save a State from any of the consequences of the neglect of its legislature to perform its duty.

Then, has the term of Judge Phelps expired? He was appointed, in January last, to be Senator in Congress from Vermont "until the next meeting of the legislature." So says the Constitution, and so doubtless said his commission. The day of their meeting is fixed by the constitution of the State, and if presumption is allowable in any conceivable case, it is in this, that the legislature has met, or will meet, on the day appointed. The words, "until the next meeting of the legislature," would seem to denote as certain a day as "the first day of next November." At all events, it cannot include a longer period than the whole of the session.

In the case of Mr. Lanman, of Connecticut, the Senate decided that an appointment could not be constitutionally made until the vacancy had actually occurred. Lanman's term expired on the 3d of March, 1825. The President had convoked the Senate to meet on the 4th of that month, and the Governor of Connecticut, in the recess of the legislature, whose session was to commence in May following, appointed Mr. Lanman, on the 9th of the preceding February, to sit in the Senate after the 3d of March. But the Senate, as above stated, decided that the appointment could not be constitutionally made at that time. *Story on the Constitution*, § 727. — *National Intelligencer, Tuesday, March* 8, 1825.

It seems quite clear, then, that if it be held that a vacancy occurred at any time subsequent to the appointment of Judge Phelps, either on the commencement of the session of the Vermont legislature, or on its adjournment without an election, that appointment does not authorize Judge Phelps to continue to hold his seat.

It certainly would seem, if the matter were *res integra*, that by an accurate and just construction of the language of the Constitution, the term

of a Senator appointed by the Governor would expire on the commencement of the session. But that point has been too well settled to be longer the subject of discussion. In February, 1851, Mr. Butler, from the committee on the judiciary, to whom was referred a resolution directing the committee to inquire and report on that subject, reported that in the opinion of the committee "the sitting member under Executive appointment has a right to occupy his seat until the vacancy shall be filled by the legislature of the State of which he is a Senator, during the next meeting thereof;" "that to fill such vacancy, it is not only necessary to make an election, but that the person elected shall accept the appointment;" and that the office of the sitting member terminates when the Senate is officially informed of such acceptance. And an early precedent was cited, in 1809, where the Senate resolved, after debate, that the Hon. Samuel Smith, appointed by the Executive of Maryland to fill a vacancy, was entitled to hold his seat "during the session of the legislature of Maryland, unless said legislature shall fill such vacancy by the appointment of a Senator, and this Senate be officially informed thereof;" and the committee stated that the precedent in that case had been uniformly followed. But in this case the legislature has adjourned.

It may be urged, that it would be too much to expect that a legislature would always elect a Senator; that it is especially important to a State that it should be always fully represented; and that every reasonable intendment should be made to effect such a purpose. In reply, it may be said, that though all reasonable intendments may be made to effectuate a salutary and important purpose; yet the Convention, familiar as it must have been with vacant seats in the old Congress, could not have considered it so important that the representation of the State should be uninterrupted, as that the anomaly, in the Senate, of a Senator appointed by a Governor, should cease as soon as possible, and should not continue from the mere failure of the legislature to exercise its functions in accordance with its duty.

The last words of the clause quoted are significant, and aid in the construction of the whole — "which (legislature) shall *then* fill such vacancy." This is legal language imposing a duty, and furnishes a strong argument to show that it was the intention of the convention that the commission of the Governor should have no force beyond the session of the legislature; and that, from that time forth, the legislature should possess all its rights, and be subject to all its responsibilities; and a failure to exercise them should not vest a new power in the Executive.

It would certainly seem that no power now exists, on a strict construction of the Constitution, to fill the vacancy, except in the legislature. Must the office then remain vacant until some special session be called for that purpose, or until the next regular session, thus leaving it in the power of the Governor to deprive the State of its representation? These remarks are crude and incomplete, and might be much modified by a more careful consideration; we merely throw them out here for the consideration of others.

Popular Vote upon the Amendments proposed to the Constitution of Massachusetts. — We give below, for future reference, the official returns of the vote upon each of the Propositions submitted to the people on the 14th of November last, and for convenience reprint the Propositions. For a statement of the doings of the Convention, see the number of the Law Reporter for September, 1853, *ante*, p. 241.

Proposition First. The frame of government. — I. The Preamble. A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts. The Frame of Government, with its Preamble and Chap-

ters, numbered One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, and Fourteen, entitled, respectively, General Court: Senate: House of Representatives: Governor: Lieutenant-Governor: Council: Secretary, Treasurer, Attorney-General, Auditor, District Attorney, and County Officers: Judiciary Power: Qualifications of Voters and Elections: Oaths and Subscriptions: Militia: The University at Cambridge, the School Fund, and the Encouragement of Literature: Miscellaneous Provisions: Revisions and Amendments of the Constitution.

Vote. Yeas, 63,222; Nays, 68,150; majority of Nays, 4,928.

Proposition Second. Habeas corpus as of right. — The writ of *habeas corpus* shall be granted as of right in all cases in which a discretion is not especially conferred upon the court by the legislature; but the legislature may prescribe forms of proceeding preliminary to the obtaining of the writ.

Vote. Yeas, 63,382; Nays, 67,006; majority of Nays, 3,624.

Proposition Third. Rights of juries in criminal cases. — In all trials for criminal offences, the jury, after having received the instruction of the court, shall have the right, in their verdict of Guilty or Not Guilty, to determine the law and the facts of the case, but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings; and also to allow bills of exceptions. And the court may grant a new trial in case of conviction.

Vote. Yeas, 61,699; Nays, 68,382; majority of Nays, 6,683.

Proposition Fourth. Claims against the Commonwealth. — Every person having a claim against the Commonwealth, ought to have a judicial remedy therefor.

Vote. Yeas, 63,805; Nays, 66,828; majority of Nays, 3,023.

Proposition Fifth. Imprisonment for debt. — No person shall be imprisoned for any debt hereafter contracted, unless in cases of fraud.

Vote. Yeas, 64,015; Nays, 66,432; majority of Nays, 2,417.

Proposition Sixth. Sectarian schools. — All moneys raised by taxation in the towns and cities, for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to and expended in no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect, for the maintenance, exclusively, of its own schools.

Vote. Yeas, 65,111; Nays, 65,512; majority of Nays, 401.

Proposition Seventh. No corporations by special acts. — The legislature shall not create corporations by special act when the object of the incorporation is attainable by general laws.

Vote. Yeas, 63,246; Nays, 67,011; majority of Nays, 3,765.

Proposition Eighth. No banks by special acts. — The legislature shall have no power to pass any act granting any special charter for banking purposes, or any special act to increase the capital stock of any chartered ank; but corporations may be formed for such purposes, or the capital stock of chartered banks may be increased, under general laws.

The legislature shall provide by law for the registry of all notes or bills authorized by general laws to be issued or put in circulation as money; and shall require ample security for the redemption of such notes in specie.

Vote. Yeas, 63,412; Nays, 67,109; majority of Nays, 3,697.

Contents of this Number. — There are perhaps few, at the present day, who will remember Mr. Hillhouse's proposed Amendments to the Constitution. Many will be startled at a proposition to choose our Chief Magistrate by lot; but such a mode of choice has been advocated by wise men, and adopted by nations, and it may not be uninteresting to consider the arguments in its favor. The case relating to maritime collisions is one of importance and interest to that large class of persons engaged in our inland navigation. *King* v. *Dewey* settles a point hitherto undetermined with regard to actions of replevin in this State. *Pingree* v. *Coffin* determines the rule for taking evidence in equity. *Feeley's case* furnishes an example of the application of the extensive powers given to the Supreme Court in relation to writs of *habeas corpus*. In *Stow* v. *Yarwood*, Judge Treat illustrates and applies the doctrine of recoupment. *Comm'th.* v. *Murphy* disposes of another of the formalities of criminal pleading.

The present number contains either a full report or an abstract of every opinion thus far delivered at the November term of the Supreme Court of Massachusetts in Suffolk County. We shall endeavor hereafter to give an abstract, or a full report, of every opinion given by that court, immediately after its delivery. This will make the Law Reporter a journal of great practical and immediate value to every lawyer in Massachusetts, and indeed to the profession throughout the United States.

The proceedings in the Wilkesbarre slave case touch directly upon a subject of the greatest interest. We shall have occasion hereafter to call the attention of our readers to the question of the mutual interference between the State and Federal authorities.

Notices of New Books.

A Practical Treatise upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions. By Daniel Davis, Solicitor-General of Massachusetts. Third edition, revised and greatly enlarged, by F. F. Heard, Esq., Counsellor at Law. Boston: Little, Brown & Co. 1853. 1 vol. pp. 753.

We are glad to perceive that a third edition of this truly valuable book has at length issued from the press. Justices of the Peace, especially in the New England States, and the profession in general, must hold themselves much indebted to Mr. Heard for the scrupulous accuracy no less than for the completeness and comprehensiveness, which his labors of supervision have contributed to confirm and increase in the admirable and indispensable work of Mr. Davis. It has long been in use in our own Commonwealth, where its merits have been universally acknowledged. The forms of indictments given as precedents have stood the test of judicial examinations, and in one case, (*Hopkins* v. *Commonwealth*, 3 Met. 460,) the opinion of Judge Shaw in admitting the sufficiency of an indictment, recognised Davis's Justice as a standard authority.

In a community like our own, intelligent and jealous of officials, it is of no slight importance that magistrates engaged in discharging the duties of a commission of the peace, should be well instructed in their functions. Not only their own reputations are involved, but the rights of property and person and the public respect for the laws are hazarded by an erroneous or ill-judged procedure. For ignorance or mistake, the world in general admits no apology, and it is the business of the professional advocate not to accept one. The public confidence ought to be acquired and deserved by the needed qualifications, and by an assured and unhesitating discharge of duty. The judicious or injudicious action of a Justice of the

Peace may in itself alone decide whether an offender shall escape the laws, and as a consequence whether a populous district shall receive adequate protection of property and life. His responsibility is great and his labors often vexatious, and it is as true now as when Blackstone wrote it, that "The country is greatly obliged to any worthy magistrate, that without any sinister views of his own will engage in the troublesome service."

Previous to the first edition of this work in 1824, there might have been more or less excuse to magistrates for deficiencies of knowledge. The works adapted to aid them in the exercise of their duties were few, and such of them as were obtainable in this country were encumbered with superfluous and inapplicable matter. However valuable to the professional man they were — and some of them were exceedingly so — yet the proportion of suitable matter was ordinarily so small that not many practising magistrates cared to incur the expense of purchasing them, to say nothing of the trouble of selecting in them what might be of immediate use. The more ancient treatises, such as those of Lambard, Crompton, and Dalton, had ceased to be practical guides, though frequently recurred to as venerable authorities. The volume published by Mr. Davis was accordingly cordially welcomed, became a manual, and passed to a second edition in 1828.

The fifteen years that have elapsed since this last date, have been fruitful in changes both in the practice of courts and in statute law, and though we have spoken above of Mr. Heard's task as being supervisory, it deserves in truth a much wider appellation. A comparison of the second and third editions show that the latter has been almost entirely re-written. The alterations and additions are numerous and important, and seem to us to have been guided by good taste and discretion, and to be such as were desirable. No less than four hundred pages have been added. The editor has judiciously contributed amongst several new chapters three on the important subjects of "Confessions," the "Competency of Witnesses," and the "Examination of Witnesses." Two chapters on "Treason" and "Piracy" have been omitted, doubtless for the reason of their want of practical utility under the common circumstances of the day. The rules for drawing complaints and indictments on page 16 *et seq.*, are very ably and clearly set forth; and this essential subject has received, as it should claim, especial attention. The arrangement of matter is logical, and the statements of law are succinct and to the point.

In the Precedents of Complaints given in the Third Part, there are a great many new ones, and the old ones have been revised. Recent statutes have created a necessity for such new forms, and it has been abundantly met. Very full information and the forms of proceedings in regard to the Maintenance of Bastard Children, are given in the forty-eighth chapter. This subject does not strictly form a part of criminal law, for the old question, whether proceedings under the Rev. Sts., Ch. 49, § 1, were of a civil or criminal character, has been finally settled by a late statute (Stat. 1851, Ch. 96) which declares that the proceedings in such prosecutions shall be according to the course in civil cases. Nevertheless for the convenience of magistrates these forms have been very properly supplied.

Instead of extracting verbally the decisions from the old authorities, Hale, Hawkins and East, the editor has inwrought them with his text. The citations are copious and answer all purposes. The latest cases in the Massachusetts Courts, and the most recent English Crown cases appear. Several of the decisions have not yet been reported, so that the law is of the freshest kind. We notice, also, among the authorities referred to, two very rare and excellent treatises, not much known in this country, although of high repute in England, viz., Gabbett's Criminal

Law, and Deacon's Digest of Criminal Law. Of no trifling value also are the two full and complete Indexes, one the General Index, and the other, that to the forms and precedents. The practising lawyer often has occasion by unpleasant experience to appreciate the worth of a good index.

We subjoin from the chapter on "Confessions" an interesting extract, the law of which is, however, exceedingly questionable.

"Another caution which it is the duty of a magistrate to make use of, when in his power, is to prevent the prosecutor and the officers who may have the party in custody, from any attempts to obtain a confession of his guilt. Both officers and prosecutors are apt to be extremely officious in this way, and many evils both to the public and to individuals have resulted from it. If the slightest influence is made use of for this purpose, and a confession thereby obtained, such confession is not only of no validity, but all subsequent confessions, however free and voluntary, whether before the magistrate or any other person, are inadmissible on the trial of the party unless it appears that the influence *was totally done away* before the confession was made. (*Regina* v. *Baldry*, 12 Eng. Law & Eq. R. 590, Bennett's note. See *Commonwealth* v. *Taylor*, 5 Cush. 605; *Rex* v. *Bryan*, Jebb, C. C. 156; *Commonwealth* v. *Knapp*, 9 Pick. 496.)

In the case of the *Commonwealth* v. *Thomas Bullough et al.*, who were indicted for burglary, the officers and others who had the prisoners in custody previous to their examination, made them certain promises, and held out to them certain inducements to confess their guilt. Whereupon one of them did confess it; and stated all the circumstances of committing the burglary. When he was afterwards examined before the committing magistrate, he again made a confession of his guilt to him. The magistrate, before he made a record of this confession, very properly explained to him the consequences of his confession; that he was not bound to make it; that he ought not to make it if he was innocent, and that if he did, it would be given in evidence against him on his trial, and that it might cost him his life. Notwithstanding all these precautions and humane suggestions on the part of the justice, the prisoner still persisted in the confession. But the court rejected the evidence of the confession, on the ground that it might not have been made, had not the first confession been improperly obtained; and the prisoner was acquitted. It appeared also in that case, that the prisoner, after he was fully committed for trial, drew up a written confession in his own handwriting, and delivered it to the keeper of the prison. This confession was also offered in evidence, but rejected by the court for the reasons above stated. Perhaps there has been no case where the humane principle in favor of the accused party has been carried so far. And it is a strong proof of the necessity on the part of a magistrate of preventing this kind of interference, as far as possible, by officious and misguided officers and individuals. This case has not been reported."

MEMOIR OF ROBERT WHEATON, with Selections from his Writings. Boston: Ticknor, Reed & Fields. 1853. pp. 385.

We have read this book with sincere and unusual pleasure; and cheerfully afford such space as we can spare, for a brief notice of its contents. The volume is a tribute of affection to the memory of a young man, remarkably distinguished by his worth, learning, and accomplishments, who was removed by death, in the flush of his early promise, from the society of friends who loved him, and from a wider sphere, which he seemed fitted to adorn with his virtues and abilities. The selections from his writings are of a cast purely literary or political, and as such can claim only a passing allusion in the pages of this journal. We can perceive that they are marked by uncommon maturity of thought, and exhibit all that sweetness and gentleness of sentiment for which the character of Mr. Wheaton was so conspicuous.

The subject of the memoir was born in New York, on the 5th of October, 1826. Soon after his birth, his father, Henry Wheaton, a name universally known and honored in the paths of law and literature, was appointed Chargé d'Affaires of the United States, to the Court of Denmark. In that country, and at Berlin, to which court Mr. Wheaton was subsequently transferred, and finally at Paris, in attendance upon schools and lectures, the early life of Robert Wheaton was passed, until the return to this country of his father and family in 1847. The protracted official

residence of his father abroad, after a fashion now too unhappily departed from by our government, afforded the son opportunities of intercourse with whatever was best in European society, and for that variety and completeness of education to be obtained under the European systems of instruction. In this way he added the accomplishments of modern language and literature to his uncommon classical acquisitions. During the space of his boyhood and youth abroad, he had cultivated a taste and talent for music to such a degree that his execution could have been rarely surpassed if equalled, by any unprofessional performer. But with a just, noble and honorable estimate of his duty, he resisted the enticements to a different career, almost inevitably presented by such acquisitions and accomplishments, and devoted himself honestly and laboriously to the study of the law, first at the Law School at Cambridge, and subsequently in an office in this city. He stepped upon the threshold of professional duties and labor, with the fairest prospect of eminence and usefulness. In July, 1851, he was admitted to the Bar; in October of the same year, he died. A fever, resulting from exposure upon a brief journey rapidly brought him to the grave. He had just completed his twenty-fifth year. And thus ended a brief existence of splendid promise and a host of noble hopes and generous aspirations!

The book, which we have thus cursorily noticed, prompted by the sweet and tender remembrances of sisterly affection, was due to his admirable qualities and early doom. The interesting story of his young life is simply, naturally and charmingly told; and his many surviving friends could have desired no more appropriate and touching memorial of his worth or of their grief.

English Reports in Law and Equity. Edited by Edmund H. Bennett and Chauncy Smith. Vol. XVI. pp. 658. Containing Cases in the House of Lords, the Queen's Bench, Common Pleas, and Exchequer, during the years 1852–53. Boston: Little, Brown & Co., 1853.

This is the sixteenth volume of Little & Brown's edition of the English Reports, with the useful notes of Messrs. Bennett and Smith. One volume follows close upon the heels of another. And it will be but a short time before the traditionary wheelbarrow, which held the *corpus juris communis* in my Lord Coke's time, will be filled with the issues of this valuable series alone. We observe one case as late as June 13, 1853. *Couturier* v. *Hastie*, p. 571, contains a gratifying reference to an American decision. Parke, B. remarks: "We entirely adopt the reasoning of an American judge (Cowen, J.) in a very able judgment on this very point in *Wolff* v. *Koppell*." 5 Hill, 458.

Obituary Notice.

On Tuesday, October 11th, 1853, at a very large meeting of the Bar of Cumberland County, Maine, at which the Hon. Nicholas Emery presided, the following Resolutions were presented by Charles S. Daveis, Esq., and adopted by a unanimous vote: —

"Whereas, The members of the Bar of Cumberland, struck with the sudden, and afflicting tidings of the departure of their lamented brother and friend, Simon Greenleaf, late Emeritus Professor of the Law Institution at Cambridge, who was called from this world to a higher on the evening of Thursday last, at his home in that place, in the full maturity of his powers and the meridian of his fame, take this earliest moment of their meeting at the opening of the October Term of the Supreme Court, to unite in offering the testimony of their sincere grief for his great loss, and their deep and earnest veneration for his virtues and character.

Although but few linger at the bar who were his former associates, and witnesses of his rising worth in the early part of his professional course, and he has for a

long period been removed from this local forum to a more enlarged and elevated sphere of labor and influence in the halls of jurisprudence, its members have never ceased to feel a warrantable pride and interest in the increasing spread and success of his works and reputation, with a lively consciousness of the lustre thus reflected upon his original training for this superior destination; cherishing in our bosoms an admiration unmixed with envy, and carrying along with it the abiding and consoling assurance to our hearts, that he was once ours, and though gone from us, he was still of us. Therefore,

Resolved, That though it is not for us to speak all that higher praise which belongs to a more appropriate province, and to recall the various wreaths he has won upon the palmiest and sunniest heights of legal eminence, and to recount moreover his ripe and acknowledged merits as a learned jurist, an accomplished instructor, and an exact, skilful, and comprehensive author — tasks pursued by him without ever abandoning the no less arduous and responsible duties of counsellor and advocate, — the fruits of which have ranked him foremost among his peers since the days of Kent and Story, who were alone his masters, and have left him to shine without corival among us in the realms of legal lore and literature; — we may revert with cordial and allowable satisfaction to *this* as being the first scene of his brilliant forensic exertions and exhibitions, in the same field with Mellen, and Longfellow, and Orr, his honored guides and seniors, among others of his learned and able contemporaries and compeers — now, alas, no more among the living — and may turn with grateful delight to him as having been our morning star in Maine, the first to give our new-born State the distinctive name of those Reports which he enriched by his own arguments, and illustrated by valuable kindred researches and contributions, leaving a model of skill and talent not soon to be surpassed, no less than a mark for emulation and instruction. Well also may we be touched with the thought, that while engaged on that more inviting theatre which opened for the ample and fitting display of his diversified talents and acquirements, he remembered us to his dying day, and revisited these old familiar spots with warm attachment and affection.

Resolved, That while graced with gifts that would have adorned any path in literature or life, and endowed with powers that would have insured deserved distinction in any line of civil or political service, his great and crowning excellence and chief distinction, in our partial estimation, was that he gave all the energies of his active, vigorous, and classic mind, and the rich resources of his rare genius to the special, patient, and enthusiastic culture of a single lofty and liberal pursuit, the noblest and most profound civil science, the most calculated of all others, perhaps, to test the mental and to discipline the moral faculties in the exciting strifes and conflicts of society — and that he kept on his consistent course to the last, undivided, and undiverted by more golden or glittering allurements — and that shunning the most graceful and appropriate honors, he devoted himself with an industry that knew no relaxation, and a zeal that recognised no bound but of existence, totally and without intermission, to this master-passion and supreme study of his life; — that it was *his* thus to afford an admirable encouraging lesson, and to exhibit a most forcible and edifying illustration of the advantage of such a noble and pure ideal in the rational estimate of life and duty, to those of the generations since come on, or yet to come, who may be led to follow its light and live up to what he taught and exemplified. And this genial influence may serve as compensation to those who were brought forward by him, to be counted even in comparison with the advantage of being with him at the bar — in all save the satisfaction, never to be forgone or forgotten, of ancient fellowship and unbroken friendship.

Resolved, That under a sense of the solemn impression produced by his lamented loss, and of the length of time to which his works may last, we could not better express our affectionate sentiments of regard for his worth, and render more justice to his memory than by the inscription, suitable to be placed upon his monument, that it was the aim of his instructions and writings, in accordance with the purpose of his life, to improve the tone and raise the standard of professional morality no less than the scale of legal excellence, and that he sought to sustain the solemn sanctions of divine law, by exhibiting confirmed grounds of evidence in devout attestation of Christian truth.

Resolved, That in pronouncing the painful words of farewell over the fresh grave of our departed friend, with the image of his bright and buoyant spirit in our minds, no more to enjoy his kindly presence on this earth — in view of the now vacant chair and desolate mansion, we shrink from approaching sorrow which no sympathy of ours can alleviate, but partaking in all that belongs to a common bereavement, and commending the objects once dearest to our lamented brother to the divine blessing bestowed upon those that mourn, —

Resolved, That copies of these resolutions be transmitted by the Secretary, to the family of our lamented brother, and also to the members of the Law Faculty at Cambridge University."

Earnest and warm eulogies of Mr. Greenleaf were then made by the Chairman, Judge Parris, Gen. Fessenden, Charles S. Daveis, J. C. Woodman and Wm. Bradbury, Esquires, who had been his early acquaintances and associates in practice: and it was

Voted, That the Chairman should present the resolutions to the Supreme Court with the motion that they might be entered on its records.

On the following morning Judge Emery presented the resolutions to the Court in accordance with the foregoing vote, and after suitable and feeling remarks from Gen. Fessenden, Judge Wells replied from the bench in a courteous manner, and with high and distinguished commendation of Mr. Greenleaf and the character of his valuable works, ordered the resolutions to be entered of record as desired, and in respect to the occasion adjourned the Court.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Amsden, Orin	Petersham,	Oct. 21,	Charles Brimblecom.
Ayer, Charles C.	Haverhill,	" 3,	N. W. Harmon.
Ayer, Wesley W.	Charlestown,	" 5,	Asa F. Lawrence.
Bailey, Samuel et al.	South Reading,	" 25,	John P. Putnam.
Bailey, James et al.	Somerville,	" 25,	John P. Putnam.
Bates, Barton B.	North Bridgewater,	" 13,	Welcome Young.
Belcher, Charles W.	Bridgewater,	" 12,	Welcome Young.
Bemis, Edwin A.	Spencer,	" 17,	C. H. B. Snow.
Blaisdell, Charles K. et al.	Lawrence,	Sept. 15,	N. W. Harmon.
Bump, Simeon W.	Middleboro'	Oct. 25,	Welcome Young.
Cady, John	Chesterfield,	" 25,	Haynes H. Chilson.
Cox, Samuel A.	Malden,	" 24,	Asa F. Lawrence.
Cummings, Thomas	Lowell,	" 15,	Isaac S. Morse.
Dolby, Albert T.	Haverhill,	" 31,	N. W. Harmon.
Driggs, Lloyd S.	Boston,	" 20,	John M. Williams.
Dunham, Thomas	Boston,	" 15,	John M. Williams.
Fairbanks, Clark	Princeton,	" 26,	C. H. B. Snow.
Fiske, Francis Jr.	Saugus,	" 24,	John G. King.
Foster, Caleb E.	Boston,	" 5,	John M. Williams.
Gunnison, Elihu et al.	Boston,	" 5,	John P. Putnam.
Gunnison, James et al.	Boston,	" 5,	John P. Putnam.
Hayden, Michael et al.	Roxbury,	" 25,	John P. Putnam.
Kimball, Stephen L.	South Reading,	" 31,	Asa F. Lawrence.
Knowlton, William H.	Shrewsbury,	Sept. 27,	Henry Chapin.
Leonard, Frederic	Raynham,	Oct. 10,	E. P. Hathaway.
Loveland, David M.	Worcester,	" 12,	Henry Chapin.
Moran, John	North Chelsea,	" 4,	John P. Putnam.
Morse, Hiram C.	Worcester,	" 25,	Henry Chapin.
Nichols, Joseph D.	Taunton,	" 26,	E. P. Hathaway.
Parks, Harvey	Worcester,	" 5,	Henry Chapin.
Partridge, Samuel	Hatfield,	" 8,	Haynes H. Chilson.
Piercy, Henry C.	Boston,	" 1,	John P. Putnam.
Pollard, Henry	Bridgewater,	" 31,	Welcome Young.
Porter, Kilburn S. et al.	Lawrence,	Sept. 15,	N. W Harmon.
Proctor, John	Townsend,	Oct. 10,	Asa F. Lawrence.
Richardson, William E.	Worcester,	" 17,	C. H. B. Snow.
Robinson, William H.	Barre,	" 1,	Charles Brimblecom.
Russell, Ira	Winchendon,	" 1,	C. H. B. Snow.
Snell, William S.	North Bridgewater,	" 13,	Welcome Young.
Snow, William C.	Leicester,	" 5,	Henry Chapin.
Savage, Matthias	Cambridge,	" 7,	Asa F. Lawrence.
Savage, James S. Jr.	Newton,	" 10,	Asa F. Lawrence.
Seaver, Joseph	Stoneham,	" 8,	Asa F. Lawrence.
Traver, Philip	Greenfield,	" 29,	David Aiken.
Wardwell, David K.	Stoneham,	" 5,	Asa F. Lawrence.
Webber, Benjamin	Beverly,	" 19,	N. W. Harmon.
Webber, James H.	Charlestown,	" 24,	Asa F. Lawrence.
Whitmarsh, Joseph A et al.	Chelsea,	" 25,	John P. Putnam.
Williams, Charles H.	Lowell,	" 10,	Isaac S. Morse.
Wood, Charles C.	Grafton,	" 27,	Henry Chapin.

LAW SCHOOL OF THE UNIVERSITY AT CAMBRIDGE.

THE INSTRUCTORS IN THIS SCHOOL ARE

Hon. Joel Parker, LL. D., Royall Professor.

Hon. Theophilus Parsons, LL. D., Dane Professor.

Hon. Edward G. Loring, University Lecturer.

The design of this Institution is to afford a complete course of legal education for gentlemen intended for the Bar in any of the United States, except in matters of mere local law and practice; and also a systematic, but less extensive course of studies in Commercial Jurisprudence, for those who intend to devote themselves exclusively to mercantile pursuits.

The course of instruction for the Bar embraces the various branches of the Common Law; and of Equity; Admiralty; Commercial, International, and Constitutional Law; and the Jurisprudence of the United States.—Lectures are given, also, upon the history, sources, and general principles of the Civil Law, and upon the theory and practice of Parliamentary Law.

The Law Library consists of about 14,000 volumes, and includes all the American Reports, and the Statutes of the United States, as well as those of all the States, a regular series of all the English Reports, the English Statutes, the principal Treatises in American and English Law, besides a large collection of Scotch, French, German, Dutch, Spanish, Italian, and other Foreign Law, and a very ample collection of the best editions of the Roman or Civil Law, together with the works of the most celebrated commentators upon that Law.

Instruction is given by oral lectures and expositions, (and by recitations and examinations, in connection with them,) of which there will be ten every week.

Two Moot Courts are also holden in each week, at each of which a cause, previously given out, is argued by four students, and an opinion delivered by the presiding Professor.

The applicant for admission must give a bond, in the sum of $200, to the Steward, with a surety resident in Massachusetts, for the payment of College dues; or deposit, at his election, $150 with the Steward, upon his entrance, and at the commencement of each subsequent term, to be retained by him until the end of the term, and then to be accounted for.

Students may enter the School in any stage of their professional studies or mercantile pursuits. But they are advised, with a view to their own advantage and improvement, to enter at the beginning of those studies, rather than at a later period.

The course of studies is so arranged as to be completed in two academical years; and the studies for each term are also arranged, as far as they may be, with reference to a course commencing with that term, and extending through a period of two years; so that those who are beginning the study of the law may enter at the commencement of either term, upon branches suitable for them. Students may enter, also, if they so desire, in the middle, or other part of a term. But it is recommended to them to enter at the beginning of an Academical year, in preference to any other time, if it be convenient. They are at liberty to elect what studies they will pursue, according to their view of their own wants and attainments.

The Academical year, which commences on Thursday, six weeks after the third Wednesday in July (27 August, 1851,) is divided into two terms, of twenty weeks each, with a vacation of six weeks at the end of each term.

During the winter vacation, the Library will be opened, for the use of those members of the School who may desire it.

The tuition fees are $50 a term, and $25 for half or any smaller fraction of a term; which entitles the student to the use of the College and Law Libraries, and Text Books, and a free admission to all the Public Lectures delivered to undergraduates in the University, comprising Lectures on Anatomy; on Mineralogy and Geology; on the Means of preserving Health; on History; on Rhetoric and Criticism; on Botany; and on Physics and Astronomy.

Students who have pursued their studies for the term of eighteen months in any law institution having legal authority to confer the degree of Bachelor of Laws, one year of said term having been spent in this School; or who, having been admitted to the Bar after a year's previous study, have subsequently pursued their studies in this School for one year, are entitled, upon the certificate and recommendation of the Law Faculty, and on payment of all dues to the College, to the degree of Bachelor of Laws.

Prizes are awarded, annually, for dissertations.

Applications for admission may be made to either of the Professors at Cambridge.